

In the Matter of TOWN OF BOXFORD

and

PROFESSIONAL FIREFIGHTERS OF MASSACHUSETTS,
LOCAL 3250, IAFF

Case No. MCR-06-5239

28. *Relationship Between c.150E and Other Statutes Not Enforced by Commission*
34.2 *community of interest*
35.11 *regular part-time employees*
35.7 *supervisory and managerial employees*
35.811 *call-firefighters*

December 23, 2008

Marjorie F. Wittner, Chair

Elizabeth Neumeier, Board Member

Daniel Kulak, Esq. *Representing the Town of Boxford*
Leah M. Barrault, Esq. *Representing the Professional Firefighters of Massachusetts, Local 3250, IAFF*
Harold L. Lichten, Esq.

DECISION'

Statement of the Case

On December 21, 2006, the Professional Firefighters of Massachusetts, Local 3250, IAFF (Union) filed a petition with the Commission seeking to certify a bargaining unit of two firefighters employed by the Town of Boxford (Town) while excluding on-call firefighters.

In lieu of an investigatory hearing, the parties agreed to a stipulated record and joint exhibits on April 2, 2007. Additionally, the Union filed a brief on July 13, 2007, and the Town filed its brief on July 16, 2007. As part of their briefs, the parties agreed to amend the stipulated record with additional exhibits and stipulations. These exhibits and the already-included joint exhibits were not set forth in the stipulated record. On August 3, 2007, the Board provided the parties with a summary of the information adduced during the investigation that included the materials the parties provided in addition to the stipulated record. Further, because it did not appear that any material facts were in dispute, the Board requested the parties to show cause why it should not resolve the representation issue based on the information summary. On August 29, 2007, the Union responded to the Board's show cause letter, and, on September 17, 2007, the Town replied to the Union's response. After reviewing these responses, the Board has corrected and modified the facts where appropriate. Because all material facts necessary to the Board's decision in this case are not in dispute, it is appropriate

for the Board to decide the case based on the information that is set out below.

Statement of Facts

The Union and the Town stipulate to the following facts:

1. Topsfield Firefighters Local 3250 of the International Association of Fire Fighters ("Union") is an "Employee Organization" within the meaning of Section 1 of MGL c.150E (the Law).
2. The Town is a municipal corporation within the Commonwealth of Massachusetts and is a public employer within the meaning of Section 1 of the Law.
3. On December 21, 2006 the Union filed a petition seeking to certify a bargaining unit consisting of permanent, full-time firefighters, including lieutenants, employed by the Town and excluding, among others, all call firefighters.²
4. Excluding the Chief, the Town currently employs two permanent, full-time members of the Fire Department, Gregory Beardsley (Beardsley) and Thomas Ash (Ash), who seek to be represented by the Union.
5. The Town operates two fire stations, commonly referred to as the East Station and the West Station.
6. Full-time firefighter Ash is scheduled to work Monday through Friday, 8:00 AM to 4:00 PM. Full-time lieutenant Beardsley is scheduled to work Tuesday through Friday, 6:00 AM to 4:00 PM. Full-time firefighters are stationed at the East Station, but respond to calls out of both the West and East Station.
7. For Fiscal Year 2007, the full-time firefighters were paid as follows: (1) Full-time Lieutenant paid \$20.80 per hour and \$31.20 per hour for overtime; and (2) Full-time firefighter paid \$19.69 per hour and \$29.54 per hour for overtime. Additionally, full-time firefighters are provided with an annual clothing stipend of \$950.000 and an annual EMT stipend of \$1,236.00. Full-time firefighters are also eligible to work details at \$39 per hour, with a 10% administrative fee being added, which goes to the Town.
8. In 2006, full-time firefighter Ash earned \$43,900 from the Town.
9. In 2006, full-time Lieutenant Beardsley earned \$53,800 from the Town.
10. Full-time firefighters are required to have successfully completed training as a pump operator and a driver prior to being hired as a full-time firefighter. Additionally, the Town requires that prior to becoming a full-time firefighter, the applicant be EMT certified and have the Firefighter I and II certifications. Finally, an applicant for a full-time firefighter position is also required to pass

1. Pursuant to the Notice of Hearing, this case was designated as one in which the former Labor Relations Commission (Commission) would issue a decision in the first instance. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the body

within the Division that is charged with deciding adjudicatory matters. References to the Board include the Commission.

2. Unless otherwise indicated, a general reference to firefighters is to firefighters of all ranks.

a physical and a drug test. None of these requirements pertain to applying for or becoming a call firefighter.

11. In 2006, the Town utilized approximately 38 call firefighters (including call captains, lieutenants and firefighters) to supplement the full-time firefighters.

12. Call firefighters are not regularly scheduled to work any shifts. Rather, call firefighters are notified by pager/beeper and choose whether to respond to an alarm based on their personal availability.

13. There are no requirements placed on call firefighters with respect to the number of alarms that must be responded to on an annual basis nor are there any minimum hour requirements with respect to time spent responding to alarms. The Town does monitor the number of hours each call firefighter works responding to alarms on a monthly basis. Call firefighters are expected to respond to a reasonable number of alarms. Failing to reach that goal may subject call firefighters to removal.

14. Call firefighters are paid an hourly rate for all time spent in response to an alarm. For Fiscal Year 2007, the following hourly rates were paid: (1) call firefighter, \$13.60 per hour; (2) call lieutenant, \$15.00 per hour; and (3) call Captain, \$15.67 per hour. Additionally, certain call firefighters positions are paid an annual stipend as follows: (1) callmen - EMT annual stipend, \$490.00; (2) call lieutenant, \$316.00; and (3) call Captain, \$697.00. Call firefighters are eligible for detail work.

15. The actual number of hours worked and amounts paid to on-call firefighters in 2006 for time spent in response to alarms are attached as Exhibit A [not published].

16. Full-time and call firefighters attend training sessions, held on every Monday night from September to June, with the exception of the last Monday of each month. Full-time and call firefighters are required to attend at least 60% of the Monday training sessions.

17. Except as set forth in paragraph 13, the training sessions are the only required work hours for call firefighters.

18. The Town maintains separate payroll accounts for the training hours worked and paid to call firefighters in 2006. That document is attached as Exhibit B [not published].

19. The Town currently recognizes International Brotherhood of Teamsters, Local 25 as the exclusive bargaining representative of the Town's full-time police patrolmen and specifically excludes part-time police patrolman from the bargaining unit. The Town separately recognizes a different union, the Boxford Police Reserve Association, as the exclusive bargaining representative for the Town's part-time police patrolmen.

20. The Town currently recognizes the Communications Association as the exclusive representative of full- and part-time communication employees.

The following information is derived from the parties' joint exhibits and from information obtained during the former Commission's investigation into this matter. The Fire Department's Monday night training may consist of:

- General firefighting techniques and practices (ladder drills, chimney fires) presented by a ranking officer knowledgeable in the field.
- Department of Transportation training from a certified instructor.
- On-location training (controlled burn, pond/ice rescue).
- Specialized training done in conjunction with a neighboring fire department.
- Films, handouts, and internet sources provided possibly from commercial vendors.
- Specialized training from representatives of the Massachusetts Firefighting Academy.

The Fire Department's full-time firefighters have discretion to respond to calls after their regular shifts end. Because emergency calls often occur at night or on weekends when full-time firefighters are not scheduled, call firefighters may be the only Fire Department personnel responding to any given call. When they do respond to calls outside their regular shifts, full-time firefighters receive overtime pay for those responses. With respect to whether the firefighters need to wait at the station until back-up personnel arrive, the evidence provided by the Town reflects that call firefighters are required to wait a reasonable time (depending on the nature of the call) for additional firefighters to arrive at the station before leaving the fire station with apparatus. Full-time firefighters are given the discretion to respond with fire apparatus immediately, or if they choose, wait for additional call firefighters to arrive at the station.³ An officer responding to a call generally assigns driving responsibilities to a qualified non-officer.

Job duties and responsibilities are essentially the same for full-time firefighters and call firefighters of all ranks when responding to fires and other emergencies.⁴ Both groups' chains of command are based on seniority rather than whether an officer's status is full-time or call.⁵ For example, the ranking officer at the scene supervises operations, regardless of whether the officer's status is full-time or call.

In 2007, the Fire Department began conducting job performance reviews of all personnel.⁶ The Chief conducts these reviews for all positions. The Chief also handles hiring and release of call firefighters with input from pertinent officers. Hiring and release of full-time firefighters is done by the Chief with input and counsel from pertinent officers and the Town Administrator. Appointments to Lieutenant are posted when an opening and sufficient funding is available and are based on qualifications, performance,

3. We have modified this sentence at the Union's request to more accurately reflect the evidence.

4. We have modified this sentence at the Union's request, which was supported by the record.

5. The chain of command for officers begins with the Chief at the top, then Deputy Chief, Captain, and finally Lieutenant. The Deputy Chief position is currently vacant.

6. These evaluations do not affect pay.

and seniority. The Chief interviews qualified candidates and makes an appointment with input from current officers. Appointments to Captain and Deputy Chief are generally not posted. The Chief makes these appointments when sufficient funding is available and bases his or her decision on seniority in the preceding rank.

Fire Department Lieutenants and Captains, whether full-time or call, have in the past verbally warned firefighters and recommended disciplinary actions to the Chief. While they currently lack a bargaining representative, Fire Department personnel can avail themselves of the grievance procedure set forth in the Town's by-laws. Under these by-laws, a grievance is defined as a "dispute between an employee and her/his appointing authority" over "an exercise of discretion" by a Town agent "with respect to the employee's condition of employment." The first step of the grievance process is reached when an employee orally presents his or her grievance to an immediate supervisor. The second step is when the employee presents the grievance in writing to his or her supervisor. The third step is when the employee presents the grievance in writing to a department head. The fourth and final step is reached when the Town's Personnel Review Board addresses the grievance.

The job description for the Town's Fire Chief indicates that the principal purposes of the position are to: (a) plan, organize, direct, and evaluate the Town's Fire Department, "which protects lives and property from fire and hazardous incident damage, and provides timely emergency medical services in the Town and other neighboring municipalities, as requested, according to Mutual Aid agreements"; and (b) ensure that the Town's Fire Department "incorporates up-to-date, efficient fire prevention, fire suppression, hazardous incident mitigation and emergency medical technologies into its procedures, equipment and methods." The job description further indicates that the Fire Chief exercises "supervision over all employees within the department, either directly or indirectly through supervisors." The essential job functions for the Fire Chief set forth in the job description are:

- Allocates, directs, motivates and evaluates departmental personnel to help:
 - Achieve their individual goals;
 - Collectively achieve the department's mission; and
 - Lead to employees' growth and accountability for their actions.
- Recruits and retains qualified personnel at all departmental levels, full-time and part-time, consistent with applicable laws, regulations and current operating procedures.
- Establishes and maintains a working environment conducive to positive morale, individual style, quality, creativity, and teamwork.
- Prepares and updates short and long range strategic plans to ensure the department's contribution to the Town's overall plans and strategies.
- Prepares realistic and fiscally sound annual budgets to enable the department to achieve its objectives.
- Develops and analyzes the department's organizational structure and organizes major accountabilities and functions into effective and measurable units within this structure: ensures that personnel

are deployed in shifts or working units which efficiently meet the Town's needs for the department's services.

- Establishes and maintains cooperative relationships with neighboring and regional fire districts and departments to ensure coordinated efforts to address common suppression, prevention, enforcement and emergency medical issues.
- Directs and conducts ongoing research into new fire service technologies and trends, and recommends implementation of programs and equipment to help the Department achieve its objectives more efficiently.
- Directs analyses of appropriate legislative and enforcement actions, including zoning and planning issues, to improve fire prevention, fire suppression, and provision of emergency medical and hazardous incident mitigation services; recommends appropriate legislation to the Town legislators and other legislative bodies, as appropriate.
- Directs training programs to prepare new firefighters to meet the challenges of fire service, and update existing employees' skills to improve the Department's professional standards.
- Directs fire prevention, first aid, and safety promotion programs for the community through civic, school, business, and other organizational groups.
- Serves as the Town's representative to committees and organizations concerned with improvements in fire services, public education, and departmental public relations.
- Serves as a member of senior management on task forces and committees participating in the Town's strategic planning efforts, and addressing Town-wide policy and management issues.
- Presents departmental issues and recommendations on major issues requiring policy direction to the appropriate advisory bodies and to Town government.
- Coordinates the Department's activities with those of other Town departments and offices to ensure a consistent approach towards common projects and interests.
- Identifies federal, state and private research and development grants; determines the scope of work for which funds are needed and prepares proposals to obtain them; administers grant funds.
- Analyzes future personnel staffing needs and develops short-and long-term plans to meet those needs.

The job description for the full-time lieutenant position indicates that the principal purposes of the job are to: (a) supervise "subordinate firefighters and/or operations at the scene of fires, medical emergencies and other disasters"; (b) supervise "on-going fire station operations and non-emergency fire services at assigned station"; (c) perform "general duty firefighter work"; and (d) provide "direction, supervision and assistance to subordinate firefighters in the execution of drills and inspections." The job description further indicates that the full-time lieutenant performs duties in emergency situations "where quick and sound decisions must be made, and where incorrect decision or action could result in serious risk of physical harm to self and co-workers, harm to other individuals, costly damage to equipment, increased property loss, or detrimental public view of the department." The job description also specifies that the full-time lieutenant exercises supervision over the training of firefighters, "is accountable for properly training and supervising firefighters and the proper maintenance of the station and equipment," and "[f]ollows the chain-of-command protocols for resolving employee conflicts or issues that may arise." The es-

stantial job functions for the full-time lieutenant set forth in the job description are:

- Maintenance of fire equipment and apparatus and general station upkeep.
- Responsible to direct and supervise fire units at the scene of fire or medical emergencies until relieved by a superior officer.
- Assist superiors in planning and conducting of training drills and equipment/apparatus operations.
- Other than instructions given by superiors in new assignments, works independently in performing regularly assigned duties; work is reviewed through inspections, verbal and written reports.
- Performs inspections and checks of fire trucks, first aid vehicles, auxiliary and mechanical equipment; and check air masks, extinguishers and truck pumps for proper operation, lubrication and pressure levels.
- Made adjustments and minor repairs to equipment and apparatus; supervise the use of equipment checklists; maintain and forward related records when required.

- Responsible for maintaining all necessary files.
- Drive or ride fire truck in response to fire alarms; place equipment and direct firefighting operations.
- Respond to requests for first aid emergency assistance; set up and operate resuscitator equipment and oxygen; administer first aid.
- The Fire Lieutenant will have contact with individuals from all segments of the Town's population, often under stressful life or property-threatening situations.
- The ability to manage individuals in a highly agitated state is critical to success of the Department.

Job descriptions for Captains and Deputy Chiefs, if those descriptions exist, were not made available to the Commission. The tables below reveal the number of hours call firefighters worked for the Town's Fire Department in calendar year 2006. Table 1 reveals the hours call firefighters worked when responding to emergency calls. Table 2 reveals the hours call firefighters worked when attending the Fire Department's training sessions.

Table 1: 2006 Response Hours Worked

(showing sum total of hours worked in 2006, median hours worked per month, mean hours worked per month, and standard deviation of hours worked per month, by call-firefighter)

Names	Rank	Sum	Median	Mean	St. Dev.	Note
Aghoian, Tamara	FF	289.00	25.75	24.08	7.61	
Balding, Mark	FF	189.50	15.50	15.79	5.32	
Barker, David	FF	16.00	1.00	2.29	2.81	June-Sept. only
Beardsley, Albert	Capt.	258.50	19.75	21.54	11.72	
Benas, Jill	FF	147.50	13.75	12.29	7.13	
Biddell III, Alfred E.	FF	59.50	4.75	4.96	1.62	
Campbell, Stephen J.	FF	108.50	9.25	10.85	9.89	Jan-Nov. only
Campbell, Susan	FF	2.00	0.00	0.20	0.42	Jan-Oct. only
Carevale, David	FF	239.00	21.25	19.92	4.59	
Cheverie, Peter	FF	84.50	5.00	7.04	5.28	
Corthell, Robert	Lt.	279.00	22.00	23.25	8.37	
Dechene, Tyler	FF	80.00	5.00	6.67	5.10	
Ferraro, Michael	FF	158.50	12.75	13.21	6.96	
Foster, Kevin	FF	278.00	22.75	23.17	5.37	
Geiger, Brian	FF	435.50	36.00	36.29	8.26	
Geiger, Michael	FF	336.50	32.25	28.04	16.37	
Gould, Alan	FF	65.50	5.00	5.46	3.95	
Gould, Warren	FF	74.50	5.00	6.21	5.44	
Greelish, Daron	FF	86.00	6.25	7.17	3.54	
Hertel, Brian	FF	264.00	21.25	22.00	6.38	
Hertel, Richard	Lt.	124.50	9.50	10.38	4.23	
Holland, Peter	FF	83.50	5.50	6.96	4.13	
Hopping Prescott, Lynn	FF	113.50	9.00	9.46	4.13	
Laverty, Edwin	Lt.	191.50	13.75	15.96	6.21	
Lucey III, Alexander	FF	36.50	12.00	12.17	11.25	Jan-Mar. only
Madden, Michael	FF	172.50	12.50	14.38	7.27	
Madden, Wendy	FF	116.50	8.50	9.71	4.32	
Nee, Thomas	FF	129.00	8.50	10.75	5.11	
Newman, Matthew	FF	85.00	5.50	7.08	4.04	
Philbin, John	FF/Lt.	374.00	32.00	31.17	6.28	
Powers, Michael	FF	51.50	4.00	4.29	1.89	
Riter, Ted	FF	0.00	n/a	n/a	n/a	No response hrs.
Rowen, John	FF	454.50	38.00	37.88	9.24	
Salie III, William	FF	25.00	2.00	2.08	1.88	
Sawyer, Kevin	FF	107.50	16.00	15.36	2.46	June-Dec. only
Smallman, Kyle	FF	32.50	2.50	2.71	1.96	
Stickney, Kerry	Capt./Chief	26.00	26.00	26.00	n/a	Jan. only
Stickney, Shawn	Lt./Capt.	365.50	29.25	30.46	12.77	

Stickney, Stephen	FF	151.50	10.75	12.63	8.92	
Thorpe, James	FF	33.00	13.00	11.00	8.19	Oct-Dec. only
West, Greg	FF	114.00	8.50	9.50	4.23	
Yako, Michael	FF	132.50	9.00	11.04	6.16	
Mean		151.70				
Median		115.25				
St. Dev.		119.91				

Table 2: 2006 Training Hours Worked

(showing sum total of hours worked in 2006, median hours worked per month, mean hours worked per month, and standard deviation of hours worked per month, by call-firefighter)

Name	Rank	Sum	Median	Mean	St. Dev.	Note
Aghoian, Tamara	FF	120.50	8.00	10.04	4.96	
Balding, Mark	FF	86.00	7.00	7.17	2.86	
Barker, David	FF	8.00	0.00	1.14	1.95	June-July only
Beardsley, Albert	Capt.	135.00	10.25	11.25	5.04	
Benas, Jill	FF	92.00	7.00	7.67	4.46	
Biddell III, Alfred E.	FF	69.50	6.00	5.79	3.82	
Campbell, Stephen J.	FF	78.50	6.00	7.14	4.03	Jan-Nov. only
Campbell, Susan	FF	58.50	6.75	5.85	2.81	Jan-Oct. only
Carevale, David	FF	95.00	7.75	7.92	2.60	
Cheverie, Peter	FF	41.50	4.00	3.46	2.92	
Corthell, Robert	Lt.	102.00	9.25	8.50	4.79	
Dechene, Tyler	FF	27.00	2.25	2.25	2.14	
Ferraro, Michael	FF	79.00	6.25	6.58	3.05	
Foster, Kevin	FF	104.00	8.00	8.67	3.09	
Geiger, Brian	FF	96.00	8.00	8.00	6.27	
Geiger, Michael	FF	94.50	7.25	7.88	4.42	
Gould, Alan	FF	73.00	6.50	6.08	2.39	
Gould, Warren	FF	61.00	5.50	5.08	2.95	
Greelish, Daron	FF	59.50	6.00	4.96	2.73	
Hertel, Brian	FF	67.50	4.50	5.63	3.64	
Hertel, Richard	Lt.	73.50	5.50	6.13	2.79	
Holland, Peter	FF	55.50	4.00	4.63	2.77	
Hopping Prescott, Lynn	FF	77.50	7.50	6.46	2.95	
Laverty, Edwin	Lt.	132.00	8.00	11.00	8.04	
Lucey III, Alexander	FF	22.00	8.00	7.33	1.15	Jan-Mar. only
Madden, Michael	FF	71.50	7.25	5.96	3.21	
Madden, Wendy	FF	73.50	7.25	6.13	2.79	
Nee, Thomas	FF	70.00	6.25	5.83	2.77	
Newman, Matthew	FF	28.50	2.00	2.38	2.07	
Philbin, John	FF/Lt.	103.00	7.50	8.58	3.96	
Powers, Michael	FF	16.00	0.00	1.33	2.46	
Riter, Ted	FF	20.00	10.00	10.00	0.00	June-July only
Rowen, John	FF	108.50	8.00	9.04	4.12	
Salie III, William	FF	52.50	5.25	4.38	2.24	
Sawyer, Kevin	FF	40.00	4.50	5.71	3.87	June-Dec. only
Smallman, Kyle	FF	39.00	3.00	3.25	2.21	
Stickney, Kerry	Capt./Chief	10.50	10.50	10.50	n/a	Jan. only
Stickney, Shawn	Lt./Capt.	72.00	5.00	6.00	3.80	
Stickney, Stephen	FF	62.00	4.25	5.17	3.37	
Thorpe, James	FF	4.50	2.00	1.50	1.32	Oct-Dec. only
West, Greg	FF	20.00	1.00	1.67	2.23	
Yako, Michael	FF	77.50	6.00	6.46	2.74	
Mean		66.13				
Median		70.75				
St. Dev.		33.76				

Opinion

The Union seeks a bargaining unit consisting of the two full-time firefighters employed by the Town, the full-time lieutenant and the full-time firefighter. The Union asserts that a unit comprised solely of full-time firefighters is appropriate because the call firefighters are casual employees and thus not appropriate for organization into a collective bargaining unit. The Union further asserts that the petitioned-for unit is appropriate because the call and full-time firefighters do not share a community of interest based on their terms and conditions of employment and by operation of Section 4A of Chapter 1078 of the Acts of 1973, which prevents the Joint Labor-Management Committee (JLMC) from rendering arbitration awards with respect to part-time employees. Finally, the Union argues that the unit is appropriate because the two petitioned-for employees share a community of interest and, contrary to the Town's assertion, the lieutenant is not a supervisor. The Town contends that the petitioned-for unit is inappropriate because it excludes the call firefighters and includes the lieutenant, who it claims is a supervisory employee. We address each of the issues raised by the parties in turn and conclude that the appropriate unit in this case consists of all full-time and regular part-time firefighters, as defined below, including the lieutenant and excluding the fire chief and captains and further excluding all managerial, confidential and casual employees and all other employees of the Town.

Call Firefighters

Section 3 of the Law requires the Board to determine appropriate bargaining units consistent with the fundamental purpose of providing for stable and continuing labor relations, while giving due regard to the following statutory criteria: 1) community of interest; 2) efficiency of operations and effective dealings; and 3) safeguarding the rights of employees to effective representation. *Town of Bolton*, 25 MLC 62, 65 (1998). It is the Board's well-established policy to include all regular part-time employees in the same bargaining unit as full-time employees with whom they share a community of interest. *See Town of Grafton*, 28 MLC 388, 400 (2002). However, the Board excludes from coverage those employees who lack a sufficient community of interest in their wages, hours and other terms and condition of employment to warrant collective bargaining. *Town of Lee*, 34 MLC 39, 45 (2007) citing *Board of Trustees/University of Massachusetts*, 20 MLC 1453, 1464 (1994).

To decide whether the petitioned-for unit is appropriate, we turn first to the threshold issue of whether the call firefighters' employment relationship with the Town of Boxford is too insubstantial or casual to justify participation in collective bargaining. This inquiry requires us to examine a number of factors, including the employees' continuity of employment, regularity of work, the re-

lationship of the work performed to the needs of the employer and the amount of work performed by employees. No one factor is dispositive. Rather, the Board examines the function, nature and character of employees' work in relation to the needs of the employer in making this determination. *Id.* (citations omitted). The existence of rights under the Law is not conditioned on an arbitrary number of hours worked per week, much less on a full-time employment standard. *Town of Leicester*, 8 MLC 1014, 1018, (1982).

The Board has decided a number of cases that specifically address the casual status of call firefighters. Generally speaking, the Board has determined that call firefighters are not casual employees and thus are entitled to collective bargaining rights, where they are a municipality's sole source of fire protection and the contours of the unit are otherwise easily identifiable because the municipality imposes certain requirements upon them, *i.e.*, by requiring them to work a specific or minimum number of shifts, participate in training, or imposing consequences for failing to respond to alarms. *See, e.g., Town of Leicester*, 9 MLC 1014 (1982), and *Town of Stow*, 11 MLC 1312 (1984), cited in *Town of Wenham*, 22 MLC 1237, 1244-1245 (1995) *aff'd sub. nom. Town of Wenham v. Labor Relations Commission*, 44 Mass. App. Ct. 195 (1998).

In recent years, the Board has also found mixed units of call and regular firefighters appropriate, where, even though the call firefighters were not a municipality's sole source of fire protection, the municipality exerted some control over their employment, by, among other things, requiring them to work a minimum number of shifts or undergo regular training. *See Town of Sturbridge (Sturbridge I)*, 18 MLC 1416 (1992) (Board included call officers, but not call firefighters, in a unit of full-time firefighters because town required two out of four officers to work weekend shifts); *Town of Sturbridge (Sturbridge II)*, 29 MLC 156, 161 (2002) (Board held that call firefighters had a sufficient interest in their employment relationship where town regularly assigned them to work weekend shifts and required them to perform monthly drills).⁷

In cases where a municipality does not assign call firefighters to specific shifts or exert some quantifiable measure of control over their employment, the Board has, with judicial approval, granted bargaining rights to at least some of these employees, where there was a clear and close relationship between the employees' work and the employer's firefighting needs. *See Town of Wenham*, 22 MLC at 1244, *aff'd*, 44 Mass. App. Ct. at 198 (unit of call firefighters appropriate for collective bargaining where there was a stable demand for the call firefighters and the town depended on them entirely to fight fires).⁸

In this case, the Town does not assign the call firefighters to work specific shifts or require them to work a minimum number of

7. At some point after 1992, Sturbridge eliminated its practice of assigning only the call officers to regular weekend duty and began assigning all call firefighters who were EMT-certified to work regular weekend shifts. 29 MLC at 161, n.10. This difference, coupled with a change in the makeup of the force (more full-timers, fewer call firefighters. *see* 29 MLC at 160), led to the different outcomes in the two *Sturbridge* decisions.

8. As discussed in more detail below however, because the town did not require the call firefighters to respond to alarms and the response records varied among individuals, the Board devised a test to determine whether some of the call firefighters were too casual to be included in the bargaining unit. *Id.*

shifts. Nevertheless, as in *Town of Wenham*, there are a number of significant factors in this case that demonstrate that the Town relies on its call firefighters to meet its firefighting needs.

Thus, even though the Town does not assign its call firefighters to particular shifts, as was the case in *Sturbridge II*, it is evident that it expects and relies upon its call firefighters to provide emergency coverage, particularly on nights and weekends. This is so not only because the Town does not assign any full-time firefighters to work evening or weekend shifts, but because it expects the call firefighters to respond to a reasonable number of alarms and enforces this expectation by subjecting them to removal from the call list if they do not reach that goal. The Town also requires call firefighters to attend at least 60% of Monday night training sessions, a financial commitment indicating that the Town expects its call firefighters to be both able and available to respond to emergency calls.

The ratio of full-time firefighters to call firefighters (2:38) coupled with the total number of hours that call firefighters spent responding to calls in 2006 (6371.5)⁹ further persuades us that the Town relies significantly upon this group of employees, as a whole, to respond to fires and other emergencies and thus militates generally in favor of granting bargaining rights to them. See *Town of Wenham v. Labor Relations Commission*, 44 Mass. App. Ct. at 198 (affirming Board's decision to grant collective bargaining rights to a group of call firefighters where the relationship of the call firefighters' work to the Town's needs and the amount of work performed by the call firefighters weighed in favor of finding the unit appropriate, notwithstanding the fact that the call firefighters were not regularly scheduled to work shifts or required to work a minimum amount of shifts).

Our inquiry does not end here, however, because even though there appears to be a stable demand for the call firefighters' services, the number of hours they worked in 2006 varied considerably from firefighter to firefighter, ranging from a low of 0 to a high of 456. The number of hours that call firefighters spent in training also fluctuated significantly, from 8 to 135 hours per year. This disparity in hours requires us to determine, which, if any, of the call firefighters have sufficient continuity and regularity of work to be deemed regular part-time, as opposed to casual, employees. *Id.*

Where, as here, part-time employees' work hours are not regularly scheduled, but rather are dependent in substantial part on the demand for their services, the Board has "crafted workable solutions that grant collective bargaining rights to those part-time employees who have a substantial employment relationship with their employer." *Town of Lee*, 34 MLC at 45, citing *Boston School Committee*, 7 MLC 1947, 1951 (1981); *Town of Wenham*, 22 MLC at 1245.

In *Town of Wenham*, after determining that a unit of call firefighters was generally appropriate, the Board utilized a "33%

solution" to weed out those firefighters whose hours were too irregular or sporadic to warrant inclusion in the unit. Accordingly, the Board held that those call firefighters who had responded to at least 33% of all alarms sounded in a year had a sufficient continuity of employment to entitle them to collective bargaining rights. This formula was upheld on appeal as "reasonable and susceptible of consistent application." *Town of Wenham v. Labor Relations Commission*, 44 Mass. App. Ct. at 199. The Board had previously devised a similar 33% solution in *Boston School Committee*, 7 MLC at 1951, where it held that substitute teachers who had worked at least 60 days out of the 180 day school year, whether or not consecutive and regardless of location, had substantial continuity of employment.

We apply a similar formula in this case to determine which call firefighters have a sufficient continuity of employment to entitle them to collective bargaining rights, modifying it to take into account the fact that the Town requires its call firefighters to attend at least 60% of Monday night training sessions. Thus, in this case, a regular part-time employee shall be defined as a firefighter who responds, on a compensated basis, to no less than 33% of all alarms sounded during the calendar year and who attends no less than 60% of the Monday night training sessions. This formula ensures that those included in the unit enjoy a substantial employment relationship with the Town both in terms of hours worked and demonstrated compliance with the job's requirements. This formula also provides a workable solution to the difficulty we would otherwise have in determining who is or is not a casual employee based on hours alone and avoids the problems inherent in conditioning the existence of rights under the Law on an arbitrary number of hours worked. *Town of Lee*, 34 MLC at 45, citing *Town of Dartmouth*, 22 MLC 1618, 1622 (1996) (additional citations omitted). Assuming that one or more call firefighters meet the criteria described above,¹⁰ we next proceed to determine whether the call firefighters otherwise share a community of interest with the full-time employees. *Worcester County*, 17 MLC 1352, 1358 (1990) (Board uses two step test to determine bargaining rights of less than full-time employees).

Community of Interest

The Union claims that the two groups of firefighters do not share a community of interest, based on differences in their training, job eligibility, duties, compensation, benefits, and the fact that fire fighting is not a call firefighters' primary occupation. The Union further contends that the two groups can never share a community of interest because the call firefighters have an irreconcilable statutory conflict with the full-time firefighters under the statute describing the authority and responsibilities of the JLMC, Chapter 1078 of the Acts of 1973, as amended by Chapter 589 of the Acts of 1987. We address these arguments in turn.

To determine whether employees share a community of interest, the Board considers factors like similarity of skills and functions, similarity of pay and working conditions, common supervision,

9. This number was derived by adding up numbers in the *Sum* column of Table 1.

10. The data provided by the parties do not include the total number of calls per fiscal year, or the number of calls to which individual call firefighters responded.

work contact and similarity of training and experience. *Waltham School Committee*, 25 MLC 137, 139 (1999). No single factor is outcome determinative. *Town of Ludlow*, 27 MLC 34 (2000) citing *City of Worcester*, 5 MLC 1108, 1111 (1978). Community of interest does not require an identity of interest, provided there is no inherent conflict among consolidated groups of employees. *Town of Somerset*, 25 ML 98, 100 (1999) citing *Franklin Institute of Boston*, 12 MLC 109 (1985). The Board has consistently found a community of interest among employees who share a similarity of interests and working conditions based upon common supervision and similar work environment. *Springfield Water and Sewer Commission*, 24 MLC 55, 59 (1998) (citations omitted).

Here, the record establishes that the job duties of both groups of employees are essentially the same when responding to fires, medical emergencies and other emergency situations. That the full-time firefighters may perform additional duties does not destroy community of interest here, where it cannot be disputed that the main duties of these employees are to fight fires and respond to other emergencies. The evidence also shows that the two groups of employees work together and under common supervision when responding to fires. Both groups of employees must also attend weekly training sessions and have their job performance evaluated by the Fire Chief.

The Union nevertheless argues that there are significant differences in job duties, compensation and benefits between the two groups of employees. It further argues that a mixed unit of 40 call firefighters and only two full-time firefighters would leave the full time firefighters with no control and little say in the terms and conditions of their employment since they can easily be outvoted by the call firefighters. However, whatever differences there may be in job duties, pay and benefits are outweighed by the undisputed fact that all Town firefighters perform similar functions under similar working conditions. *Sturbridge II*, 29 MLC at 162. See, also *Town of Seekonk*, 30 MLC 121, 127 (2004) (part-time high school library pages included in library employees unit); *Town of Milford*, 22 MLC 1625, 1630 (same); *Worcester County*, 17 MLC 1352, 1360 (1990) (temporary employees held to have a community of interest with permanent employees despite differences in training and lack of benefit and step increases); *Town of Sterling*, 4 MLC 1704 (1978) (regular part-time hourly police officers shared a community of interest with regular full-time police officers). Accordingly, although the call and regular firefighters have some differences in pay, benefits and training, we do not find they are so significant as to produce inevitable conflicts in the bargaining unit.

With respect to the Union's claim that a mixed unit of 40 call firefighters and only two full-time firefighters would leave the full-time firefighters with little or no control over their working conditions because they could be outvoted by the call firefighters, we note first that it is unlikely that all 38 or 40 call firefighters will meet the definition of regular part-time employee set forth above.

Second, there do not appear to be any representation cases where the fact that part-time employees outnumber the full-time employees is dispositive of whether the part-time employees should be included in the unit. In the few cases where this issue has been explicitly considered, see, e.g., *Town of Lincoln*, 1 MLC 1422, 1424-25, the relative number of full and part-timers has been only one factor out of several that led the Board to conclude that the part-time employees were not appropriately included in a unit with their full-time equivalent.¹¹ Cf. *Waltham School Committee*, 25 MLC 137, 140, n. 15 (1999) (declining to infer that merging a ten-month secretaries unit with a twelve-month secretaries unit would cause the ten-month secretaries to effectively seize control of future negotiations because they outnumbered the twelve-month secretaries in the absence of evidence that the twelve-month secretaries interest would not be served as a result of being fewer in number than the ten-month secretaries.). Here, the Union contends that the call firefighters will have different interests than the full-time firefighters because the call firefighters' main occupation is not firefighting. We decline to exclude the eligible call firefighters on such speculative grounds, particularly where the unit that we have devised is intended to include only those firefighters who have an important and continuing interest in their employment relationship with the Town. See *Town of Wenham v. Labor Relations Commission*, 44 Mass. App. Ct. at 198 (33% solution devised by Commission protects the rights of public employees who have an important employment relationship with the Town).

The JLMC Statute

The Union further argues that the Board should reject a mixed unit of call and full-time firefighters because that unit would create an irreconcilable statutory conflict with Chapter 1078 of the Acts of 1973, Section 4A. We disagree.

Section 4A (2)(a) of Chapter 1078 of the Acts of 1973, as amended, provides in part that the JLMC shall have oversight responsibility for all collective bargaining negotiations involving municipal police officers and firefighters, and that the JLMC shall, at its discretion, have jurisdiction in any dispute over the negotiations of the terms of a collective bargaining agreement involving those public employees.

Section 4A(3)a) states that the JLMC shall have "exclusive jurisdiction in matters over which it assumes jurisdiction" and, in relevant part, provides for binding interest arbitration as one of several procedures and mechanisms available to resolve collective bargaining negotiations. The penultimate paragraph of Section 3(a) states, "No member of a unit of municipal police officers or firefighters who is employed on a less than full-time basis shall be subject to the provisions of this clause." The Union argues that because this provision prevents the JLMC from making an arbitration award affecting part-timers in a mixed unit of full and

11. This is not necessarily the case in CAS petitions, where the Board has, on at least one occasion, declined to accrete a group of employees into a unit without an election where the number of employees sought to be accreted exceeded the number of employees in the existing unit. See *Massachusetts Bay Transportation Authority*, 20 MLC 1330 (1993) citing *City of Lowell*, 8 MLC 1328, 1331-112 (H.O.) 1981).

Notably however, under those circumstances, the Board did not deem the unit inappropriate altogether, but indicated that it might permit a self-determination or add-on election provided certain other criteria were met, including a sufficient showing of interest and a community of interest between the employees in disputed titles and employees in the existing unit. *Id.* at 1334-1335.

part-time firefighters, as a matter of both law and common sense, the procedures for obtaining a collective bargaining agreement would have to be radically different for each group. The Union claims that there can be no community of interest between such groups when the presence of one could destroy the leverage of the other to effectuate a final collective bargaining agreement and enforce its terms. The Town disagrees, noting that the Board rejected the identical argument in *Town of Sturbridge*, 32 MLC 33 (2005) (*Sturbridge III*)¹² and there is no apparent reason for the Board to reverse itself now.

We agree with the Town. While we acknowledge the JLMC's lack of authority to issue interest arbitration awards with respect to part-time firefighters, we decline to construe the single provision relied on by the Union as rendering all mixed units of full-time and regular part-time firefighters and police officers *per se* inappropriate, as the Union would apparently have us do. On its face, this statutory provision provides no basis for reversing longstanding precedent finding mixed units of full-time and regular part-time police officers or firefighters appropriate where the parties otherwise share a community of interest. Compare MGL c. 150E, §3 (describing the composition of the appropriate bargaining units in the case of uniformed members of the state police, judicial employees, and state lottery commission employees).

Furthermore, as the Board stated in *Sturbridge III*, the provision at issue in Section 4A3(a) is member, not unit specific, and therefore does not prevent the JLMC from exercising jurisdiction over a dispute involving full-time firefighters or issuing a binding arbitration award covering full-time firefighters. 32 MLC at 35-36. Although binding interest arbitration is available only to full-time firefighters as a means of resolving contract disputes, the parties remain free to resolve these disputes through other means, including methods that take into account the JLMC's limited jurisdiction. We are therefore not persuaded by the Union's arguments in this regard, and turn to the Town's argument that the full-time lieutenant should be excluded from the bargaining unit because he is a supervisory employee

Lieutenant

The Board generally excludes supervisors from bargaining units of those they supervise because of the inherent conflicts between these classes of employees. The central inquiry is "whether indicia of supervisory authority are strong enough to mandate separation of supervisors from those they supervise." *Town of Greenfield*, 5 MLC 1036, 1040 (1978). However, in determining supervisory status, "It is often necessary to draw the line between the true supervisor and an employee who possesses but limited supervisory authority." *Somerville School Committee*, 6 MLC 2092, 2093-94 (1980). "Supervisors are employees with independent authority or effective recommendatory powers in major personnel

decisions such as hiring, transfer, suspension, promotion and discharge." *Marblehead Municipal Light Department*, 9 MLC 1323, 1327 (1982).

The Town argues that the lieutenant is a supervisor because the job description indicates that he clearly exercises supervisory authority over both call and full-time firefighters. However, although the job description indicates that the lieutenant supervises subordinates at the scene of a fire, in the fire station and in the execution of fire drill and inspections, it does not indicate that the lieutenant is responsible for making major personnel decisions. The ability to direct work, standing alone, is insufficient to establish supervisory authority. *Sturbridge I*, 18 MLC at 1421.

The Town also argues that the lieutenant should be excluded from the unit based on his ability to adjust grievances at the first step of the grievance procedure set forth in the Town's by-laws. Although an employee's "immediate supervisor" has the authority to adjust grievances at the first step of this procedure, the evidence does not conclusively establish that lieutenants are considered immediate supervisors for purposes of this procedure or that lieutenants have ever performed this function.

Nevertheless, the facts reflect, and the Union does not dispute, that lieutenants have, "in the past" verbally warned employees and recommended disciplinary action to the Chief. The record does not indicate however, the timing or content of these warnings or whether the Chief has ever acted on those recommendations. Although the ability to issue and recommend discipline is indicative of supervisory status, it cannot be dispositive where there is no other evidence that the lieutenants have independent authority to make, or the power to recommend effectively, personnel decisions such as whether to hire, transfer, suspend, evaluate, promote or discharge employees. *Id.*, citing *Greater New Bedford Regional Vocational School Committee*, 15 MLC 1040, 1045 (1988) (additional citations omitted). We conclude therefore that the full-time lieutenant is appropriately included in the bargaining unit of full-time and regular part-time firefighters.

Conclusion

Based on the record and for the reasons stated above, we conclude:

1. That a question of representation has arisen concerning certain firefighters of the Town of Boxford.
2. That a unit appropriate for collective bargaining consists of all full-time and regular part-time firefighters excluding the Fire Chief and further excluding all managerial, confidential and casual employees and all other employees of the Town of Boxford.
3. That for purposes of this unit the term "regular part-time firefighter" is defined as:

12. Approximately one year after the Board issued *Sturbridge II*, the Professional Fire Fighters of the Sturbridge Fire Department (PFFSFD) filed a CAS petition in *Sturbridge III* seeking to exclude all regular part-time firefighters from the mixed unit of firefighters that the Board had certified in *Sturbridge II* on the grounds that the JLMC statute presented an irreconcilable statutory conflict. The Board dismissed the petition on a variety of procedural and substantive grounds, including

the fact that the firefighters' job duties had not changed since the Board's unit determination and the PFFSFD had failed to raise at hearing the legal issues it had raised on both reconsideration and in the CAS petition. 32 MLC at 35, 36. The Board also was not persuaded by the PFFSFD's legal arguments regarding the JLMC's jurisdiction, which were substantially the same as those that the Union raises here. *Id.*

Firefighters who have, in the past calendar year: 1) responded, on a compensated basis, to no less than 33% of the total number of alarms sounded and 2) attended no less than 60% of all of the fire department's scheduled Monday night training sessions.

In or about January 1 of each year, the parties will meet to review information from the prior calendar year to determine which firefighters meet the above criteria.

For purposes of defining regular part-time firefighters for January 1, 2009 through December 31, 2009, a regular part-time firefighter shall be defined as follows:

Firefighters, who responded on a compensated basis to no less than 33% of the total number of alarms sounded from January 1, 2008 to December 31, 2008 and attended no less than 60% of all of the fire department's scheduled Monday night training sessions from January 1, 2008 to December 31, 2008.

4. The Board directs the Union to notify the Division of Labor Relations within fourteen (14) days from the date of this decision whether it wishes to proceed to an election in this matter. The Union shall serve a copy of this notification on the Town.

5. If the Union provides notice that it wishes to proceed to an election, then the Town of Boxford, within fourteen (14) days of receiving that notification, shall provide the Division of Labor Relations and the Union with an election eligibility list, containing the names and addresses of all eligible voters, as defined above.

6. If, after receiving the election eligibility list, the Division finds that a sufficient showing of interest has not been made, the Division shall give the Union written notice of that finding and allow it seven (7) days after receipt of that notice to submit a further showing of interest. If a sufficient showing of interest is not timely submitted, the Board may dismiss the petition. Otherwise, the Board shall issue a Direction of Election in the unit described above.

SO ORDERED.

* * * * *

1. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." References in this decision to the Commonwealth Employment Relations Board (Board) include the former Labor Relations Commission (Commission). Pursuant to Section 13.02(1) of the Commission's Rules in effect prior to November 15,

In the Matter of TOWN OF SOUTH HADLEY
and

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, COUNCIL 93, AFL-CIO

Case No. MCR-07-5276

33. *Consent Agreements and Stipulations*
34.2 *community of interest*
35.7 *supervisory and managerial employees*

December 23, 2008
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Tim D. Norris, Esq. *Representing the Town of South Hadley*

Joseph L. DeLorey, Esq. *Representing the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO*

DECISION AND DIRECTION OF ELECTION¹

Statement of the Case

On March 31, 2007, the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (Union) filed a petition with the Commission in Case No. MCR-07-5276 seeking to represent a bargaining unit consisting of certain full-time and regular part-time employees of the Town of South Hadley (Town). The Union subsequently amended its petition on or about July 26, 2007 to seek two bargaining units: a bargaining unit of non-supervisory, administrative, clerical, inspectional and support service employees of the Town (Unit A) and a bargaining unit of supervisory employees of the Town (Unit B).

On October 5, 2007, a duly designated Commission hearing officer, Margaret M. Sullivan, Esq., (Hearing Officer) conducted a hearing at which both parties had the opportunity to be heard, to examine witnesses and to introduce evidence. On October 5, 2007, before any witnesses testified, the Hearing Officer allowed the Union's motion to sequester witnesses prior to giving testimony, except Patricia Vinchesi (Vinchesi), the town administrator. Pursuant to the parties' requests, the Hearing Officer kept the record open in order that the parties could file additional stipulations of fact about the positions, which they were seeking to exclude, and they did so on February 7, 2008.² The parties filed their post-hearing briefs postmarked on or about March 31, 2008.

2007, the Commission designated this case as one in which it would issue a decision in the first instance.

2. Those additional stipulations of fact are contained in enumerated stipulations 11-21, below.