

In the Matter of BOARD OF HIGHER EDUCATION

and

AFSCME, COUNCIL 93, AFL-CIO

and

ASSOCIATION OF PROFESSIONAL ADMINISTRATORS,  
APA/MTA/NEA

Case No. CAS-06-3659

34.2 community of interest

34.8 similarity of work

34.91 accretion

March 5, 2010

Marjorie F. Wittner, Chair

Elizabeth Neumeier, Board Member

Harris Freeman, Board Member

James B. Cox Esq. Representing the Board of Higher  
Education

Joseph L. DeLorey, Esq. Representing AFSCME, Council  
93, AFL-CIO

Priscilla A. Lyons Representing the Association of  
Professional Employees,  
APA/MTA/NEA

## DECISION

### Statement of the Case

On November 24, 2006, AFSCME, Council 93, AFL-CIO (AFSCME or Petitioner) filed a petition for unit clarification with the former Labor Relations Commission<sup>1</sup> seeking to accrete the title of Staff Assistant/Laboratory Specialist into its existing bargaining unit at Bridgewater State College (College). On January 12, 2007, the Association of Professional Administrators, APA/MTA/NEA (APA) filed an unopposed motion to intervene.<sup>2</sup> On January 30, 2007, the parties filed a joint motion to have the petition resolved under the Division's written submission procedure for CAS petitions. The former Commission granted that motion on February 2, 2007.

Both AFSCME and the Board of Higher Education (Employer) filed written submissions and response to each other's written submissions. The APA did not file a written submission.

On December 21, 2009, the Board directed the parties to show cause why it should not resolve the unit placement issues based on

the information adduced during the investigation.<sup>3</sup> None of the parties raised any factual issues in response to the show cause letter. Therefore, 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<sup>4</sup>

#### Background

The Petitioner's and the APA's Bargaining Units

The College employs over 900 employees. The Petitioner represents approximately 330 employees in a bargaining unit comprised of administrative assistants, clerks, library assistants, buyers, accountants, laboratory technicians, receiving tellers and mail clerks. The recognition clause of the Petitioner's and the College's 2005-2008 collective bargaining agreement states in pertinent part:

The Employer recognizes the Union as the sole and exclusive bargaining agent for the purpose of establishing wages, hours, standard of productivity and performance and all other terms and conditions of employment for all full-time and regular part-time employees in the bargaining units certified on January 20, 1976 and any and all amendments since that date....

Should any new classified classification(s) be added to the work force, the Employer shall notify the Union of such new classified classification(s). The Employer shall determine if such new classification(s) shall be added to the bargaining unit and the Employer shall notify the Union of its determination. If the Union disagrees with the Employer's determination, the matter may be referred to the State Labor Relations Commission by the Union, with a request that the Commission make a determination....<sup>5</sup>

The APA represents approximately 220 College employees on campus. Its bargaining unit includes employees in the title of Staff Assistant/Supervising Lab Tech and Staff Assistant/Lab Instructor.<sup>6</sup> As discussed below, the Biology, Physics and Chemistry departments employ employees in these titles.

#### Creation of Staff Assistant/Lab Specialist position

Joseph Keen (Keen) worked for the college as a Lab Tech II in the College's Chemistry Department from 2000 to 2006. He was a member of AFSCME's bargaining unit in that period. His duties as Lab Tech II included preparing chemistry labs for chemistry professors; verifying which chemicals and equipment professors needed for their labs; and ordering and restocking materials. He also set up and dismantled classroom labs and sometimes sat in on classes to provide extra assistance to students. As of 2006, Keen had a Bachelors Degree in chemistry from the College and was ap-

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 Division of Labor Relations or the Commonwealth Employment Relations Board (Board) include the former Labor Relations Commission (Commission).

2. That motion is granted.

3. The Board mailed a copy of the show cause letter to the APA on January 19, 2010 and allowed it an additional 21 days to respond to the letter.

4. The Board's jurisdiction is uncontested.

5. Both the Petitioner and the Employer included a copy of the recognition clause in their respective written submissions.

6. The parties' submissions do not include a list of all the titles in the APA's unit.

proximately four months away from receiving a Masters Degree in Public Health from the University of Massachusetts.

At the end of 2005, the College obtained a grant to buy a \$200,000 Nuclear Magnetic Resonance Spectrometer (NMR). The NMR is a sophisticated piece of equipment that allows chemists to determine the molecular and atomic structure of chemical substances. After a user places a substance in the NMR, the NMR generates graphs and spectrograms depicting the substance's molecular makeup. Only individuals with specialized training and a scientific background can read and interpret the machine's output. The College's faculty uses this machine regularly to conduct their own experiments and students use it as part of lab courses.

At some point after the College bought the NMR, it realized it needed someone to operate it. The College then conducted a review of the duties of lab support staff in the Biology, Chemistry and Physics departments and concluded that Mr. Keen's existing lab work as a Lab Tech II aligned him more closely with the APA's bargaining unit than with AFSCME's bargaining unit. Because the College did not believe that the duties related to operating the NMR would constitute full-time work, it decided to combine Keen's existing duties as a Lab Tech II with his NMR duties and place the new, hybrid position into the APA's bargaining unit.

In July 2006, the College notified Carolyn Anderson, AFSCME's Chief Steward, that, due to the acquisition of the NMR, it was thinking about eliminating the AFSCME Lab Tech II position and creating a new APA Staff Assistant position for Keen. Ms. Anderson and AFSCME Staff Representative Roger Barbrick subsequently met with Mr. Keen to discuss this issue. Keen told them that if the College were to do this, it would also have to create a Lab Tech I position to free him up to do the additional work associated with operating the NMR. AFSCME then told the College that, although they believed that the work that Keen would do on the NMR was still AFSCME bargaining unit work, they would be amenable to creating an APA Staff Assistant position, as long as the College also posted and filled a Lab Tech I position. The College rejected the proposal, stating it could not justify adding another Lab Tech position.

The College posted the new Staff Assistant/Lab Specialist position on September 1, 2006 as an APA position. The duties set forth in the posting are:

- Responsible for supporting the laboratory component of all chemistry courses.
- Oversees all departmental instrumentation and manages the use and maintenance of the NMR.
- Prepare lab equipment for teaching and research activities and insure proper maintenance of equipment.
- Provide guidance and direction to faculty, staff and students using NMR.
- Prepare materials for lecture demonstrations.

The posting further reflects that this position is supervised by the Chairman of the Chemistry Department and that a Bachelor's Degree in Chemistry or Biochemistry is required.

Keen filled the posted position. As of the date of the petition, he spent approximately 65% of his time performing the duties he performed while he was a member of AFSCME's bargaining unit. During the school year, he spends the remaining 35% of his time operating the NMR. This percentage drops to 10% during the summer months, when the NMR is used less frequently.

Keen is the only person on campus responsible for the use, maintenance and calibration of the machine. Keen calibrates the machine on a daily basis, by running a known substances in the machine and evaluating the resulting spectrogram to ensure that the NMR is issuing accurate results. He does so independently and believes he could not perform those tasks without having a Bachelor's Degree in chemistry and a formal background in organic chemistry.<sup>7</sup>

Keen works with students, faculty and the other Staff Associates in Chemistry. His work with students includes discussing their research goals to determine exactly what type of analysis they intend. He then instructs them on how to achieve their research objectives and/or performs a literature search of academic biomedical journals, to determine how the user could best perform the analysis. Keen explains the results of his research to the student and instructs him or her on how to approach molecular analysis. Once the NMR analyzes the substance, Keen aids the user in understanding the resulting spectrograms.

His work with faculty includes setting up their lab for lessons and assisting them with NMR usage. On average, during the academic year, he prepares about five to eight lab classes per week.

Keen also supervises Chemistry work-study students who help with the lab preparation tasks. He has no regular interaction with AFSCME-represented employees outside of the Chemistry Department.

#### Composition of the Chemistry Department

The College's Chemistry department consists of one Chairperson, three APA titles, and one AFSCME administrative assistant. In addition to the Staff Assistant/Lab Specialist, the APA positions are the Staff Associate/Supervising Lab Technician and Chemistry Lab Instructor. According to the job description provided by the Employer, the Staff Associate/Supervising Lab Technician is "responsible for the coordination of laboratory activities within an academic unit..." This position reports to the Chair of the Chemistry Department. Its duties include laboratory planning, directing and instructing subordinates in laboratory techniques and procedures; participating in and/or supervising the acquisition and maintenance of laboratory supplies and equipment; maintaining and repairing equipment; and supervising and instructing students and faculty on more sophisticated instruments. The requirements of this position include a Bachelor's Degree in Chemistry and ex-

7. This information is obtained from Keen's affidavit, which was attached as an exhibit to the Employer's Response to the Union's Written Submission.

perience suitable to fulfill its duties and responsibilities of the position.

The Chemistry Lab Instructor is a ten-month position that is responsible for teaching, preparation and limited administration of lab sections; assisting with faculty and student research; and other academic activities. Her support duties also include preparing for labs, supervising the preparation, maintenance and storage of lab equipments and working under a faculty member to set up and dismantle labs. The Chemistry Lab Instructor must have a minimum of a Masters Degree in Chemistry or a closely related field, proficiency in pertinent lab techniques, and the ability to teach in laboratory situations.

#### Other APA Laboratory Positions

The Biology and Physics departments also employ APA Staff Associates/Supervising Lab Techs. Both positions have essentially identical job descriptions, which set forth their duties as:

- Ascertain laboratory planning by administrators, department chairperson and faculty members and coordinate the implementation of such plans.
- Responsible for the coordination of lab preparation for teaching and research.
- Maintain department budget (chemistry Staff Associate does not have this resp.)
- Participate in and supervise lab preparations including set up. Maintain, store and dispose of materials.
- Prepare lab equipment for teaching and research activities.
- Direct and instruct on lab techniques and procedures. On a one on one basis, demonstrate and explain the use of lab procedures and equipment to subordinates and students.

Both positions require at least a Bachelor's Degree in an appropriate academic field.

#### Other AFSCME Lab Positions

The only remaining AFSCME Lab Tech title at the College is a Lab Tech II employed in the Biology Department. The incumbent in the position formerly worked as an AFSCME groundskeeper.

The Employer provided a job description for this position that the employee filled out in 1998, in which he describes his duties as "maintaining the greenhouse plants, structure and the botanical garden." He also orders supplies for lab experiments and assists when needed in the labs; propagates new plants from existing ones; demonstrates plant procedures and principles to college students and elementary students when asked; and makes new flower gardens and creates new designs.

The incumbent in this position does not have a Bachelors degree, nor is one required. He is a licensed pesticide applicator.

#### The Lab Tech Series in General

According to the Department of Personnel Administrator classifications, Lab Tech I and IIs provide technical support services to agency staff in the diagnosis and treatment of disease and the performance of scientific and research experiments. Their listed duties include:

- Perform routine tests such as biological, chemical, histological, hematological, etc. using lab apparatus and testing equipment and following standardized procedures to provide data for use in the diagnosis and treatment of disease or other scientific experiments.
- Operate lab equipment such as microscopes, counters and spectrophotometers for lab tests and research and scientific experiments
- Based on assignment, may set up and operate and maintain complex equipment for special tests such as electrocardiograms.

#### Opinion

A unit clarification petition is the appropriate vehicle to determine whether newly created positions should be included in or excluded from a bargaining unit and to determine whether substantial changes in the job duties of an existing position warrant either its inclusion in or exclusion from the bargaining unit. *Town of Athol*, 32 MLC 50 (2005). In analyzing whether a position should be accreted into an existing bargaining unit, the Board considers: 1) whether the position was included in or excluded from the unit at the time the unit was originally recognized or certified; 2) whether the parties' subsequent conduct, including bargaining history, discloses that the parties considered the position to be in the bargaining unit; and 3) whether the position shares a community of interest with other positions in the existing bargaining unit. *Town of Granby*, 28 MLC 139, 141 (2001); *Board of Trustees of the University of Massachusetts*, 28 MLC 144, 146 (2001); *Worcester School Committee*, 15 MLC 1178, 1180 (1988). In examining the first prong of the accretion test, the record establishes that the Employer created the new Staff Assistant/Laboratory Specialist position in September 2006. Because the position was not in existence when the Board certified AFSCME as the exclusive bargaining representative in 1976, the first prong of the three-part test is inconclusive. Furthermore, AFSCME's protests over the unit placement of this position in APA's unit in 2006 demonstrate that AFSCME and the Employer do not consider Staff Assistant/Laboratory Specialist to be part of AFSCME's unit. The second prong of the accretion analysis is therefore inconclusive. In any event, AFSCME's recognition clause reflects that the Employer and AFSCME have agreed to refer unit placement disputes over newly-created positions to the Labor Relations Commission (now the Board). The merits of the petition are therefore properly before us and we turn to the third prong, community of interest.

Where a position shares a community of interest with more than one bargaining unit, the Board places the position in the unit with which it shares the greater community of interest. *Board of Trustees, University of Massachusetts*, 31 MLC 209, 215 (2005). Accordingly, we must decide whether the Staff Assistant/Laboratory Technician shares a greater community of interest with AFSCME's bargaining unit or with the APA's unit.

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, work contact and similarity of training and experience. *Town of Granby* at 141; *Boston School Committee*, 12 MLC 1175, 1196 (1985). No single factor is outcome determinative. *City of Springfield*, 24 MLC 50, 54 (1998); *City of Worcester*, 5 MLC 1108, 1111 (1978). Additionally, members of a bargaining unit need

share only a community of interest rather than an identity of interest. *County of Dukes County/Martha's Vineyard Airport Commission*, 25 MLC 153, 155 (1999); *Springfield Water and Sewer Commission*, 24 MLC 55, 59 (1998).

The facts demonstrate that both APA bargaining unit members and the AFSCME lab tech set up labs, order supplies and provide assistance to students who use the College's laboratories. The facts also reflect that Keen, the new Staff Assistant/Laboratory Specialist, continues to perform a number of the same skills that he performed as a Lab Tech II. However, there is no dispute that his duties have expanded to include operating, reading, calibrating, and maintaining the NMR, a sophisticated and expensive piece of analytical machinery. The Staff Assistant/Lab Specialist is the only non-faculty member with this specialized knowledge. In that capacity, he trains and works with both students and faculty to determine how to best achieve their research goals using the NMR. This may include doing a literature search and reading academic journals. Keen could not accomplish these tasks without having a bachelors degree in chemistry and a formal background in organic chemistry. These NMR-related skills and functions are very similar to those held by persons with APA lab titles, individuals who either teach chemistry lab classes or assist faculty with planning and preparing for labs. This position has much less in common with the AFSCME lab tech, whose work requires horticultural skills, but not a scientific academic background. The record also shows that the new position is located in the Chemistry Department, where there are two other APA staff associates who perform actual lab work and an AFSCME administrative assistant, who does not.

AFSCME nevertheless argues that Keen still belongs in its unit, because its bargaining unit includes Lab Techs and many of Keen's NMR duties fall within the range of duties set forth in the Commonwealth's Lab Tech job specification. However, in deciding unit placement issues, the Board does not rely solely on job descriptions, but looks at actual job duties performed by bargaining unit members and the degree and nature of the interaction between members of the unit. *Wellesley School Committee*, 1 MLC 1389 (1975) *aff'd. Town of Wellesley School Committee v. Labor Relations Commission*, 376 Mass. 112 (1978). Here, the Petitioner has failed to provide evidence that the Staff Assistant/Lab Specialist and the AFSCME Lab Tech share any similarity of training, experience, supervision or work contact. Accordingly, we find that the Staff Assistant/Lab Specialist position shares a greater community of interest with the members of the APA's bargaining unit than with the Petitioner's unit.

#### Conclusion

For the reasons stated above, we decline to accrete the Staff Assistant/Lab Specialist position into AFSCME's bargaining unit and dismiss the petition.

SO ORDERED.

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## In the Matter of SUFFOLK COUNTY SHERIFF and

AFSCME, COUNCIL 93, AFL-CIO

Case No. CAS-08-3718

34.901	timeliness of filing
34.93	severance
35.821	correctional officers
93.4	petition for clarification
93.7	employer's petition

March 30, 2010

Marjorie F. Wittner, Chair

Elizabeth Neumeier, Board Member

Harris Freeman, Board Member

Charles J. Abate, Jr., Esq. Representing the Suffolk County Sheriff's Department

Erin L. Goodwin, Esq. Representing AFSCME, Council 93, AFL-CIO

### DECISION

#### Statement of the Case

On January 10, 2008, the Suffolk County Sheriff (Sheriff or Employer) filed a petition for unit clarification with the Division of Labor Relations (Division). The Sheriff seeks to remove 47 lieutenants from a bargaining unit of correction officers (CO-1), corporals (CO-2), sergeants (CO-3) and lieutenants (CO-4) who work at the Suffolk County House of Correction (HOC). The Sheriff seeks to accrete the CO-4 lieutenants to a bargaining unit comprised of captains (CO-5s) who work at the HOC and captains and lieutenants (JO-5 and JO-4, respectively) who work at the Suffolk County Jail (Jail). AFSCME, Council 93 (Union) represents all the bargaining units at issue in the petition in a number of different locals, as described below. The Sheriff filed a written submission in support of its petition on or about February 13, 2008. The Union filed a response opposing the petition and seeking its dismissal on March 14, 2008.<sup>1</sup> The Sheriff filed a reply on April 7, 2008.

The Union disputes a number of claims made by the Sheriff in its submissions regarding the CO-4s' duties and purported changes thereto.<sup>2</sup> However, for purposes of this decision only, even taking the Sheriff's representations as true, the Sheriff has failed to dem-

1. The Union argues that the petition itself is deficient as it does not contain the date on which the employee organization was first certified or recognized, including the case number. The Sheriff contends, and this Board agrees, that this is a *de minimis* oversight that has been cured by the parties' later submissions. The Board therefore declines to dismiss the petition on this ground.

2. The Union provided two affidavits: one from James Breslin, a Union staff representative who has been working on behalf of Locals 419, 3643 and 3647 since 1997, and the other from Thomas Flynn, the President of Local 419 and an HOC corporal. Flynn has worked in the Sheriff's Department since 1994. In its reply to the Union's response, the Employer provided the affidavit of Gerald Horgan, who