

rivatively, Section 10(b)(1) of Massachusetts General Laws, Chapter 150E by failing to abide by the results of the October 20, 2006 secret ballot vote to convert the JFK School to a Pilot School and by unilaterally imposing additional pre-conditions on the existing Pilot School conversion procedure.

The Boston Teachers Union posts this Notice in compliance with the Commonwealth Employment Relations Board's Order.

WE WILL abide by the results of the October 20, 2006 secret ballot vote on whether to convert the John F. Kennedy School to a Pilot School by forwarding the Pilot School proposal to the Joint Steering Committee for its consideration.

[signed]
For the Boston Teachers Union

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE
DEFACED OR REMOVED**

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Division Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

* * * * *

In the Matter of WESTON SCHOOL COMMITTEE
and
AFSCME COUNCIL 93, LOCAL 335

Case No. CAS-08-3732

May 23, 2011

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

James M. Pender, Esq. Representing the Weston Public Schools
Joseph L. DeLorey, Esq. Representing AFSCME, Council 93

DECISION¹

Introduction

The Weston School Committee (Employer or School Committee) seeks to sever the Bookkeeper in the Weston Public School's Food Services Department (FS Bookkeeper) from a bargaining unit of Food Services employees represented by the American Federation of State, County and Municipal Employees, Council 93, Local 335 (Union or AFSCME) and accrete it to the bargaining unit represented by Weston Educational Administrative Assistants Association (WEAAA). As grounds for the petition, the Employer argues that the FS Bookkeeper's responsibility for calculating a program surplus that is distributed to bargaining unit members pursuant to a formula set forth in the parties' collective bargaining agreement (CBA) creates financial conflicts of interest and divided loyalties. AFSCME opposes the position on the grounds that avoiding speculative conflicts does not warrant unit severance and because the FS Bookkeeper otherwise shares a community of interest with the rest of its bargaining unit.

After considering the parties' submissions and arguments, the Commonwealth Employment Relations Board (Board) dismisses the petition because the FS Bookkeeper's responsibilities do not create an inherent conflict of interest warranting severance.

Statement of the Case

The Employer filed this petition on August 11, 2008. On October 10, 2008, the Employer filed additional materials in support of its petition including an affidavit from Cynthia Mahr (Mahr), Director of Finance and Operations for the Weston Public Schools, the FS Bookkeeper's job description, an organizational chart, and copies of the most recent AFSCME and WEAAA CBAs.

1. Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations' name is now the Department of Labor Relations.

The Union filed its response to the petition on November 26, 2008. On December 11, 2008, the Employer filed its reply in the form of a second affidavit from Mahr.²

Background

AFSCME's bargaining unit

Since 1976, the Union has represented workers employed in the Employer's Food Services Department. The *Recognition and Certification* clause of the parties' August 1, 2005-July 31, 2008 CBA contains the following unit description:

[A]ll cafeteria General Helpers, Bookkeepers, Cooks, Assistant Cooks, Cook Managers and Food Service Managers, but excluding substitute workers filling in for injured employees . . . any other person employed in an administrative capacity and further excluding all other employees of the School Committee, pursuant to the provisions of Chapter 150E of the General Laws of the Commonwealth, the decision of the Labor Relations Commission in Case MCR-2315.³

As of 2008, AFSCME's bargaining unit included the FS Bookkeeper at issue, sixteen General Helpers, three Cook Managers, one Cook, one Assistant Cook, and two Food Services Managers. All AFSCME bargaining unit members report to the Food Services Director.

WEAAA's bargaining unit

The WEAAA represents a school office staff unit. The Employer and the WEAAA were parties to a collective bargaining agreement effective from July 7, 2007 to June 30, 2010. Pursuant to that agreement, WEAAA's unit consists of:

[S]witchboard operator, accounting personnel, bookkeeper, administrative assistant, and all referred to in this Agreement as "Employee;" but not including . . . cafeteria personnel. . . .

WAPA's Bargaining Unit

The Weston Aides/Paraprofessional Association (WAPA) is the exclusive representative of the Weston Public School's teaching aides and paraprofessionals. Two of the titles in that unit, Paraprofessional/Instructional Aide, High School Agency Account and Paraprofessional/Instructional Aide, Middle School Agency Account, have some bookkeeping responsibilities.

Program Surplus Payments

Article XXIII, Section 6 of the CBA states in pertinent part:

(a) Recognizing the importance of the employees' contribution to the outcome of the Food Service Program through their efforts and their attendance, the parties agree to institute for the life of this Agreement, an extra compensation system based on Program surplus, if any according to the following criteria.

a. Program surplus in any given fiscal year shall be as determined by the Profit and Loss statement.

b. In the event a surplus is determined at the conclusion of a fiscal year, the employer shall distribute, in the form of an additional payroll not considered either holiday or vacation pay, an amount of 20% of surplus of up to \$5,000 to the employees of record during the fiscal year.

c. Each qualified employee's share of the distribution will be pro-rated on the basis of the employee's actual hours worked vs. the total hours actually worked by all the employees in that unit during that fiscal year. . . .

d. The parties agree that the success of the Food Service Program requires mutual support and confidence, between the employer and the employees, in sound principles of program management reflective of School Committee policy and of the laws and regulations of the Commonwealth of Massachusetts and the U.S. Department of Agriculture. The parties agree to make every good faith effort to implement, within the scope of available resources, such practices and improvements as will foster desired Program effectiveness.

The Food Services Bookkeeper

This title has been in the Union's bargaining unit since 1976.⁴ One of the Bookkeeper's responsibilities is to calculate the Program Surplus. More generally, as set forth in the job description, the FS Bookkeeper:

[C]ompiles and accurately records financial data for the purpose of maintaining the Accounts Receivable Ledger and completion of state reports, Mass. meals tax and other reports as they may become required. Invoices will be reviewed for accuracy, summarized and scheduled for payment on a weekly basis. Assists Director with management and communications in a fast paced food service office.

The FS Bookkeeper must have a high school degree or equivalent and basic bookkeeping skills.

In recent years, the FS Bookkeeper has worked more hours on average than any other Food Service employee. As such, she has received the largest individual share of the Program Surplus. There is no evidence that the FS Bookkeeper has any discretion with respect to the hours that she or other bargaining unit members work or discretion or decision-making authority regarding the Program Surplus beyond calculating the surplus amount in any given year.

In 2008, the Employer made some unspecified changes to its Food Services accounting/bookkeeping systems to ensure greater oversight of Food Services' operations funds. The Employer contends that it made these changes as a result of what it describes as "financial mismanagement" attributable to another bargaining unit member (not the FS Bookkeeper).

2. The Employer served a copy of its petition and submissions on the WEAAA president. The WEAAA has not moved to intervene in this proceeding or taken any position on the petition.

3. The Board takes administrative notice of Case No. MCR-2315 (June 7, 1976), in which the former Labor Relations Commission certified the following unit after consent election:

All helpers, clerk-cashiers, assistant cooks and cook managers and EXCLUDING Director of Food Services and all other employees.

4. Although the original certification does not include the title "bookkeeper," on the face of the petition, the Employer does not dispute that the position has been in AFSCME's unit since 1976.

Other Bookkeepers and Community of Interest

There are two bookkeepers in the WEAAA's unit: Head Bookkeeper and Assistant Bookkeeper/Business. Both the WEAAA and AFSCME bookkeepers must adhere to the standards for appropriate handling and distribution of funds pertaining to General and Revolving Funds. Both the WEAAA and AFSCME are required to adhere to the Massachusetts Department of Elementary and Secondary Education (DESE) and Federal Department of Agriculture oversight and reporting regulations. The WEAAA bookkeepers do not report to the Food Services Director.⁵

Two WAPA titles also have some accounting/bookkeeping responsibilities, but are not required to adhere to the same standards.

The WEAAA and Food Services bookkeepers interact with respect to payment of invoices and other accounting matters. According to the Employer, the Food Services Bookkeeper also interacts with the Payroll Clerk, a WEAAA bargaining unit member, on accounts payable matters.

Analysis

As a general rule, a unit clarification petition is appropriate when determining whether newly-created positions should be included or excluded from a bargaining unit, and to determine whether substantial changes in the job duties of existing positions warrant either their inclusion or exclusion from a bargaining unit. *Town Of Provincetown*, 31 MLC 55, 59 (2004) (citing *Sheriff of Worcester County*, 30 MLC 132, 136 (2004), further citing *North Andover School Committee*, 10 MLC 1226, 1230 (1983)). In most cases, a unit clarification petition may not be used to exclude positions from a certified bargaining unit unless: 1) the original description of the unit lacked specificity; 2) the duties of the position at issue have changed since the certification; or 3) a position has been created since the certification. *North Andover School Committee*, 10 MLC at 1230. Additionally, a unit clarification petition is appropriate if the objective of the petition is "... clearly supported by an apparent deficiency in the scope of an existing unit and must be, at least arguably, within the realm of what the... parties intended when the unit was first formulated." *Sheriff of Worcester County*, 30 MLC at 136. However, such a petition may not be used to "frustrate the parties' clearly expressed unit placement of a disputed classification." *Town of Athol*, 32 MLC 50, 52 (2005).

The Employer seeks to remove the Food Services Bookkeeper from the Union bargaining unit because it believes that there is a "possible" conflict of interest regarding the Program Surplus fund. Specifically, the Employer argues that because the Food Services Bookkeeper is eligible to participate in the Program Surplus incentive program, she should be removed from the unit to avoid the "inherent conflict" that such "divided loyalties" and financial incentives may create for her and fellow bargaining unit members.

Treating the Program Surplus duties as a change to the position since it was first certified in 1976, the question before the Board is whether the Bookkeeper's Program Surplus duties create an inherent conflict of interest within the unit such that severance is warranted.⁶ We conclude that they do not.

There may be some truth to the Employer's assertion that the FS Bookkeeper's Program Surplus duties create an incentive to overstate the amount of the Program Surplus so that more money can be distributed to her and fellow bargaining unit members. However, the mere potential for dishonesty in one's work performance does not create the type of inherent conflict the Board has previously recognized as warranting separate bargaining units, such as the conflict resulting from true supervisors belonging to the same bargaining unit as the employees they supervise. *See, e.g., Town of Granby*, 28 MLC 139 (2001). In true conflict of interest cases, the Board has held that the supervisor's performance of duties intrinsic to the position, such as disciplining employees on whom they rely to secure improved terms and conditions of employment through the collective bargaining process, creates a conflict with the allegiance the supervisor owes to the employer, particularly in terms of discipline and productivity. *Id.* at 142 (citing *Town of Bolton*, 25 MLC 62, 67 (1998) and further citing *City of Westfield*, 7 MLC 1245, 1250 (1980)). As a result of this actual conflict, the Board generally avoids placing the supervisor and the employees in the same unit. *Id.*

In this case, however, the asserted conflict is speculative and would arise only if the Food Services Bookkeeper did *not* perform the job duties set forth in her job description, i.e., *accurately* compiling and reporting Food Services financial data. The Employer would therefore have the Board base severance on the potential of employee malfeasance. The Board, however, decides appropriate unit placement based on actual, not potential job duties. *Town of Chelmsford*, 27 MLC 41, 43 (2000). Here, where is no evidence that the FS Bookkeeper's duties include any discretion with respect to the number of hours that she or other bargaining unit members work, or how the Program Surplus is distributed once calculated, there is no basis to conclude that the FS Bookkeeper's honest performance of her actual duties create any actual or potential conflict of interest warranting unit severance.

Moreover, if the Employer's argument is taken to its logical extreme, then any bargaining unit member with the ability to alter payroll or time records could be removed from the unit based on the mere specter of fraudulent behavior. This would not be conducive to stable and continuing labor relations. In this case, the FS Bookkeeper has been in the bargaining unit since 1976 and there is no indication that this has created any actual conflicts within the unit. Although the Employer argues that this title shares a community of interest with the bookkeepers in the WEAAA's bargaining unit based on their similar duties and occasional interaction, standing alone, this provides no basis to disturb the FS Bookkeeper's longstanding inclusion in the Food Services bargaining unit, espe-

on which the Program Surplus duties were added. It is reasonable to presume, however, that the FS Bookkeeper did not have these duties when the position was first created. The Union does not contend otherwise.

5. The submissions do not reflect to whom they report.

6. Although the face of the petition indicates that the disputed title's job duties have changed since the position was first created, the Employer failed to provide the date

cially where the WEAAA unit description expressly excludes all cafeteria employees.

Finally, while we are not unsympathetic to the Employer's stated concerns, its submission reflects that it has already begun to address them through additional oversight of its accounting systems. In addition, as the Union suggests, such concerns can be addressed through discipline, as circumstances warrant.

Conclusion

For the reasons stated above, we decline to remove the FS Bookkeeper position from the bargaining unit represented by the Union and accrete it into the bargaining unit represented by the WEAAA. The Employer's petition is dismissed.

SO ORDERED.

* * * * *

In the Matter of TOWN OF LEXINGTON
and

CARY MEMORIAL LIBRARY STAFF ASSOCIATION,
LOCAL 4928, MLSA, AFT-MASSACHUSETTS, AFL-CIO

Case No. MUP-08-5313

82.3 *status quo ante*
83. *Compliance*
92.413 *motion for reconsideration/clarification*

May 25, 2011

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Laurie W. Engdahl, Esq. *Representing the Town of
Lexington*

Haidee Morris, Esq. *Representing the Cary Memorial
Library Staff Association, Local
4928, MLSA, AFT-MASS,
AFL-CIO*

RULING ON MOTIONS FOR CLARIFICATION AND STAY PENDING CLARIFICATION OR APPEAL¹

On December 9, 2010, the Commonwealth Employment Relations Board (Board) issued a decision [37 MLC 115] in the above-referenced matter concluding that the Town of Lexington (Town) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of MGL c. 150E (the Law) when it ceased granting paid time off to employees to observe certain religious holidays without giving the Cary Memorial Library Staff Association,

Local 4928, MLSA, AFT Massachusetts (Union) prior notice and an opportunity to bargain to resolution or impasse over the change. The Board also concluded that the Town repudiated a side letter of agreement (Side Letter) relating to granting paid time off for religious observances. To remedy the violations, the Board issued an Order requiring the Town, *inter alia*, to "Immediately adhere to all terms of the Side Letter."²

The Town filed a timely notice of appeal of the decision. In addition, on March 31, 2011, the Town filed a Motion for Clarification of Decision and a Motion for Stay of Decision Pending Appeal or Clarification. The Union did not respond to the Town's motions.

Motion for Clarification

The Town seeks to clarify that portion of the Board's remedy ordering the Town to adhere to the Side Letter, which states:

The Town celebrates holidays on the dates designated by the State and as outlined in the collective bargaining agreement. . . . In addition to what is outlined in Article X [Holidays], it has been the practice of the Library Director to allow paid time off for other religious observances when requested by the staff. The Town represented by the Library Director will continue to support similar requests in the future.

Specifically, the Town seeks guidance as to the Side Letter's use of the term "religious observances." The Town correctly points out that the Board found that it had a practice of granting employees paid time off for three holidays—Rosh Hashanah, Yom Kippur and Good Friday. The Town seeks to clarify whether the Board's Order requires it to grant paid time off for those three holidays only or whether the Board intended the term "religious observances" to be interpreted more broadly. If the Board intended the term "religious observances" to be interpreted more broadly, then the Town seeks guidance in defining that term, and what the standards may be for approving time off.

Discussion

In repudiation cases, the Board's standard remedy includes a cease and desist order requiring that the respondent end its unlawful conduct and take whatever affirmative action is necessary to effectuate the purposes of the Law, including implementing the agreement and making whole those employees who were affected by the unlawful conduct. *See, e.g., Suffolk County Sheriff's Department*, 30 MLC 1, 8 (2006); *Town of Falmouth*, 20 MLC 1555, 1561 (1994). Ordering the Town to immediately adhere to the terms of the Side Letter is consistent with this standard.

The Board made a finding that the scope of the established practice was limited to granting paid leave for Yom Kippur, Rosh Hashanah and Good Friday. No evidence was presented that the Town either granted or denied paid time off to employees for religious observances *other* than these three religious holidays before it unilaterally ceased this practice altogether.³ Because there was

1. Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations' name is now the Department of Labor Relations.

2. The full text of this decision is reported at 37 MLC 115 (2010).

3. The record does reflect one occasion on which an employee requested time off for a different religious holiday, Ash Wednesday, but the record does not indicate whether the request was granted. *See* 37 MLC at 117, n.5.

no evidence introduced indicating that requests for any other religious holidays were granted or denied by the Town, the Board had no way of knowing how the Town would have responded if an employee had asked to take paid time off for other “religious observances.”

In the end, the purpose of the Board’s remedies is to restore the parties to the position in which they would have been but for the unfair labor practice. *Commonwealth of Massachusetts*, 29 MLC 162, 164 (2003). Here, at a minimum, that means granting paid time off without loss of vacation or personal leave to employees who request time off to observe Rosh Hashanah, Yom Kippur or Good Friday. If a bargaining unit member *now* requests paid time off for a “religious observance” not squarely addressed by the parties’ past practice as found on the record in this case, the Town must respond to that request as it would have pre-repudiation. The Board declines to give the Town any guidance in that regard because to do so would be speculative in the absence of any other evidence.

Conclusion

To the extent the Town’s Motion for Clarification sought the Board to modify its remedy, the Board declines to do so for the reasons set forth above. The Board’s original Order remains in full force and effect. Furthermore, in light of this ruling, the Board denies the Town’s request for a stay of the decision pending clarification or otherwise pending appeal to the Massachusetts Appeals Court.

SO ORDERED.

* * * * *

In the Matter of PLYMOUTH COUNTY SHERIFF’S DEPARTMENT

and

NATIONAL CORRECTIONAL EMPLOYEES UNION

Case No. CAS-10-3747

23. *Contract Bar*
45.1 *contract bar*

June 8, 2011

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

John Connor, Esq. Representing the National Correctional Employees Union
Isabel N. Eonas, Esq. Representing the Plymouth County Sheriff’s Department

DECISION¹

This petition raises the issue of whether an unfunded collective bargaining agreement (CBA) serves as a contract bar to a unit clarification petition filed more than 180 days before the CBA’s expiration. For the reasons recently set forth in *Bristol County Sheriff’s Office*, 37 MLC 132 (2010), the Commonwealth Employment Relations Board (Board) concludes that the parties have executed a binding contract that serves as a legitimate contract bar.

Statement of the Case

On January 7, 2010, the National Correctional Employees Union (NCEU or Union) filed a unit clarification petition seeking to accrete Lieutenant Roland Fruzetti (Fruzetti) and Captain Joseph Reilly (Reilly) into the NCEU’s bargaining unit of all full-time and regular part-time Lieutenants and Captains employed by the Plymouth County House of Correction and Jail. The Plymouth County Sheriff’s Department (PCSD) filed a response to the petition on February 4, 2010. On February 24, 2010, the parties participated in an informal Department conference. Both parties submitted post-conference statements.

On April 1, 2011, the Board sent the parties a letter asking them to show cause why it should or should not dismiss the petition based on the contract bar rule set forth in Section 14.06 (1)(b) of the Department’s Rules and Regulations, 456 CMR 14.06 (1)(b). Both parties responded to the show cause letter.

1. Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations’ name is now the Department of Labor Relations (Department). References to the Department include the Division of Labor Relations.