

In the Matter of CITY OF BOSTON

and

BOSTON POLICE DETECTIVES BENEVOLENT  
SOCIETY

and

SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 888

and

ANTONIOS S. ELIOPOULOS

Case No. MCR-06-5205

14. Professional Employees  
35.6 professionals  
92.35 stipulations  
93.32 reinvestigation of certification

December 27, 2011

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

Jordan Ablon, Esq. Representing the City of Boston  
Paul T. Hynes, Esq. Representing the Boston Police  
Detectives Benevolent Society  
Alfred Gordon, Esq. Representing the Service  
Employees International Union,  
Local 888  
Olinda Marshall, Esq. Representing Antonios Eliopoulos

#### RULING ON REINVESTIGATION OF CERTIFICATION

##### Summary

The Commonwealth Employment Relations Board has reinvestigated the Department of Labor Relations' (Department) 2009 certification of the Boston Police Detectives Benevolent Society (BPDBS) as the exclusive representative of a bargaining unit of the City's part-time and full-time professional civilian employees (BPDBS unit). For the reasons set forth below, the Board concludes that the Forensic Video Analyst (FVA) employed by the City of Boston (City) is not a professional employee within the meaning of Section 1 of MGL c. 150E (the Law). The Board therefore declines to amend the BPDBS unit to include the FVA.

##### Statement of the Case

Antonios S. Eliopoulos (Eliopoulos) has been employed as a FVA in the City's Forensics Unit since 2007 and is a member of the city-

wide "Clerks and Techs" bargaining unit represented by Local 888, SEIU (Local 888). On March 31, 2007, Eliopoulos sent the Department a letter seeking inclusion in the BPDBS unit. On July 22, 2011, the Department decided to treat Eliopoulos' request as a motion for reinvestigation of certification pursuant to 456 CMR 14.15<sup>1</sup> and to conduct a hearing to determine whether to amend the certification on grounds that Eliopoulos is a professional employee within the meaning of Section 1 of the Law. On September 23, 2011, the City, the BPDBS and Local 888 filed a joint motion to dismiss the motion on various procedural grounds.<sup>2</sup> The Board denied the motion on October 11, 2011.<sup>3</sup> On October 12, 2011, Board Chair Marjorie F. Wittner conducted a hearing at which all parties had an opportunity to be heard, examine witnesses and introduce evidence. After considering the entire record, including the parties' timely-filed, post-hearing briefs, the Board declines to amend the BPDBS certification to include the FVA.

##### Stipulations of Fact

Before the hearing, Eliopoulos, the BPDBS, Local 888 and the City entered into the following stipulations of fact.

1. The City of Boston ("City") is a public employer within the meaning of MGL c. 150E, Section 1.
2. The Boston Police Detectives Benevolent Society ("BPDBS") is an employee organization within the meaning of MGL c. 150E, Section 1.
3. The Service Employees International Union, Local 888 is an employee organization within the meaning of MGL c. 150E, Section 1.
4. Antonios Eliopoulos has been employed in by the Boston Police Department ("BPD") since 1995. Eliopoulos presently is employed as a forensic video analyst within the BPD. Eliopoulos previously held the titles of audio/visual technician and videographer/AVID editor within the BPD.
5. Prior to February 20, 2007, Eliopoulos had been assigned to the Office of Multi-Media Productions within the BPD. Effective February 20, 2007, the BPD reassigned Eliopoulos to work in the Bureau of Investigative Services, Forensic Group/Identification and Photo Unit and he began to perform the duties of his current position.
6. The SEIU represents Eliopoulos for purposes of collective bargaining and his position is covered under the SEIU Clerks & Techs collective bargaining agreement.
7. Captain Genevieve King is currently the head of the BPD's Forensics Group that is part of the BPD's Bureau of Investigative Services.

1. 456 CMR 14.15 states:

For good cause shown, the [Department] may reinvestigate any matter concerning any certification issued by it and, after appropriate hearing, may amend, revise or revoke such certification.

2. The City, Local 888 and the BPDBS argued that the request was untimely, disruptive to stable labor relations and procedurally improper.

3. The Department has designated the Board to decide this matter in the first instance. The Board's jurisdiction is uncontested.

8. Following his job reassignment on February 20, 2007 and the change in his job duties, Eliopoulos, with the assistance of the SEIU, petitioned the BPD for a job reclassification. As a result of the petition, effective January 5, 2008, Eliopoulos' position was reclassified and he was placed in the position of video forensic analyst.

9. On April 10, 2006, the BPDBS filed a petition with the [former] Labor Relations Commission seeking to represent certain employees of the City who work in the Boston Police Department and who were then represented by the SEIU for purposes of collective bargaining.

10. In a decision dated September 9, 2009, *see City of Boston*, 36 MLC 29 (2009), the [Board] directed that an election be held for the following professional employees within the meaning of Section 1 of the Law:

All full-time and regular part-time professional employees employed by the City of Boston in the following positions: senior criminalist, criminalist, supervising forensic technologist, and forensic technologist, excluding all managerial, confidential, and casual employees and all other employees of the City of Boston.

*Id.*

11. On October 20, 2009, an election was held as directed by the [Board] and a majority of eligible voters elected to be included in an overall bargaining unit consisting of professional employees represented by the BPDBS.

12. By letter dated March 29, 2011, Mr. Eliopoulos wrote to the Department of Labor Relations and petitioned the Board to reopen its investigation in the present matter to determine whether his forensic video analyst position is properly placed within the professional unit now represented by the BPDBS.

13. Eliopoulos obtained a B.A. degree in Humanities in 1994 from Suffolk University in Boston, [Massachusetts].

#### Findings of Fact

As a preliminary matter, we take administrative notice of the facts contained in our previous unit determination in this case in which we held that the employees in the bargaining unit, as described above in Stipulation No. 10 were professional employees entitled to an election to determine whether they wished to be represented separately or included in an overall unit consisting of both professional and non-professional employees. In so holding, we relied on the parties'<sup>4</sup> stipulation that the petitioned-for employees were the "only professional employees within the meaning of Section 1 of the Law whose terms and conditions of employment were contained in the SEIU Clerks & Techs collective bargaining agreement." *See City of Boston*, 36 MLC 29, 40 (2009). That stipulation has been called into question by this proceeding.

The City of Boston's Forensic Group consists of four units: the Physical Comparison Unit, which has two sub-units, the Firearms Analysis Unit and the Latent Prints Unit; the Crime Scene Response Unit and its subunit, the ID & Photo Unit; the Quality Assurance Unit; and the Crime Lab Unit, which has four subsections: Criminalistics, DNA, Serology and Trace. BPDBS unit members work in the Crime Lab Unit and the Latent Prints Unit.

Before 2007, Eliopoulos worked as one of three Audio-Visual Technician photographers (AV Techs) in the City's Multi-Media Productions Office. At some point in 2006 or 2007, Eliopoulos' supervisor told him that one AV tech was going to be transferred to the Bureau of Information Services, ID and Photo Unit. Eliopoulos was transferred because he had the least seniority.

The ID and Photo Unit is located in the south side of Police Headquarters on the first floor. This unit is across the hall from the Crime Scene Response Unit office and downstairs from the Crime Lab, which is on the second floor. The Latent Prints Unit is located on the third floor.

Eliopoulos shares an office with a sergeant, an officer and, on occasion, two sergeant detectives. All the employees in this space are assigned to the Crime Response Unit. The ID and Photo unit also employs two civilian clerks who are represented by Local 888 and some police officers. The clerks work outside Eliopoulos' office pulling criminal behavior records for investigators.

As of the date of the hearing, Eliopoulos reported to Sergeant Chris Walsh, who, in turn, reports to Lieutenant Detective Maloney, the head of the Crime Scene Response Unit. Lt. Det. Maloney reports to Captain Genevieve King, the head of the Forensics group.

Before his transfer, Eliopoulos worked as a photographer and videographer who did not use computers in his work, except to access his email. After his transfer, his work no longer included videography or photography. Instead, as described in greater detail below, Eliopoulos' work mainly consists of performing forensic examinations, i.e., enhancements and processing of video, audio, and photographs on behalf of law enforcement personnel using computers, printers, scanners and forensic video analysis software.

Eliopoulos' salary grade and compensation initially did not change after his transfer. In 2007, with Local 888's assistance, Eliopoulos filed a compensation grade appeal. As part of that process, he filled out a lengthy questionnaire describing his new position. Eliopoulos' response to questions regarding the necessary qualifications for the position was based on what he mistakenly thought the Law Enforcement and Emergency Services Video Association (LEVA)<sup>5</sup> required to obtain FVA certification. Thus, in response to a question regarding requisite licenses or certifications for the position, Eliopoulos responded that a four year undergradu-

4. The parties in that case were Local 888, the City and the BPDBS.

5. According to the "Mission & Goals" section of LEVA's website, which was admitted into evidence, "LEVA is a non-profit corporation committed to improving the quality of video training and promoting the use of state-of-the-art, effective equipment in the law enforcement and emergency services community."

ate degree from an accredited college/university was required, as well as LEVA's Forensic Video Analyst Certification and Ocean Systems Training Certification."<sup>6</sup> Eliopoulos later learned that LEVA certification requires only an Associate's degree, plus additional coursework and experience.

In response to questions regarding the level of independence and discretion exercised in performing his duties, Eliopoulos checked the box accompanying the statement that "My supervisor lets me decide for myself [how] my work is done. I ask questions only if a problem arises." Eliopoulos also checked boxes indicating that his supervisor did not review his work and that he must "analyze a number of different variables and determine the proper mix in performing his assignments." Eliopoulos further indicated that he was "required occasionally to consider different courses of action or deviate from standard operating procedures to get the job done." He did not select the option stating that his job "frequently required him to refine existing work methods and develop new techniques, concepts or programs within established limits or policies."

Eliopoulos also listed all the machines and equipment he needed to perform his job on the questionnaire. These included various image enhancement and editing software and hardware systems, machines to produce multiple CD and DVD copies of evidence, high-quality photo printers, scanners, machines to stabilize and clear video evidence, live and archived footage from the City camera locations and the evidence locker, where all BPD evidence is kept secured.

As of the hearing date, Eliopoulos had not obtained any type of FVA certification. Although he had completed LEVA's forty-hour Basic and Intermediate Forensic Video Analysis courses, for which he received college credit, he had not completed LEVA's Level Three Advanced course. Since 2009, Eliopoulos efforts to obtain FVA certification have been based on the requirements set by the International Association for Identification (IAI), another organization that issues certifications in a number of forensics topics, including FVA, Latent Prints and Crime Scenes.<sup>7</sup> Although he is not yet certified, Eliopoulos has been a LEVA and IAI member since 2007 and 2009, respectively.

The City has never requested that he take the advanced LEVA course or any other forensic video courses but has paid for all the courses he has taken since 2007, as listed below:

1. In September 2007, Eliopoulos completed a four (4)-day training course entitled *Digital Video and Adobe Photoshop*.

6. Ocean Systems makes video forensic software. Eliopoulos obtained Ocean Systems certification around June 2008, after he completed the questionnaire.

7. Eliopoulos testified that he switched to IAI because it required fewer courses than LEVA.

8. The two Local 888 clerks assigned to the ID and Photo unit are also compensated at an R-11 pay grade.

2. In September 2007, Eliopoulos completed a forty (40)-hour training course entitled *Basic Forensic Video Analysis and the Law*.

3. In September 2007, Eliopoulos completed a forty (40)-hour training course entitled *Intermediate Forensic Video Analysis and the Law: Processing Digital Multimedia Evidence*.

4. In May 2008, Eliopoulos completed a training course in the video forensic software VideoFOCUS Source.

5. In June 2008, Eliopoulos completed thirty-two (32)-hour of dTective training on Avid for Windows.

6. In September 2008, Eliopoulos completed a three (3)-day training course entitled *Adobe Photoshop for Forensics*.

7. In September 2008, Eliopoulos completed The Laboratory Safety Institute's Half-Day Lab Safety Training Program that was presented for the Boston Police Department.

8. In October 2009, Eliopoulos completed a three (3)-day training course entitled *Comparison Analysis of Video and Image Evidence*.

9. In April 2010, Eliopoulos completed a sixteen (16)-hour training course entitled *Courtroom Testimony Techniques "Success Instead of Survival."*

10. In July 2010 Eliopoulos completed Criminal Justice Information Services ("CJIS") and National Crime Information Center ("NCIC") training and passed the certification examination.

In 2009, the City granted Eliopoulos' compensation grade appeal, retroactive one year to January 2008. Eliopoulos' title was changed from an R-11 Audi-Visual Technician Photographer<sup>8</sup> to an R-18 Forensic Video Analyst, resulting in an annual salary increase of about \$29,000 a year.<sup>9</sup>

After the reclassification, the City, in consultation with Local 888, created an FVA job description that listed the following minimum entrance requirements:<sup>10</sup>

Applicants must possess a minimum of two (2) years of full-time professional experience as a [FVA]. A Bachelor's degree in Forensic Science, Forensic Identification, Physical Science, Criminal Justice or related field is required. Applicants may substitute a master's degree in one of the aforementioned degree areas for one year of the experience requirement. Applicants must possess LEVA's Forensic Video Analyst Certification and Ocean Systems Training Certification. It is strongly preferred that applicants have experience with applying forensic equipment, methods, techniques, software and hardware for the examination and enhancement of video, audio and digital images; knowledge of video technology; ability to effectively communicate; knowledge of digital CCTV systems; ability to work in a lab enforcement; provide expert testimony; and operates the appropriate tools and equipment.<sup>11</sup>

9. Under the most recent Local 888 contract, entered as Joint Exhibit 1, an employee classified at R-11 Step 10 earns \$39,817.41 annually. An employee classified at R-18, Step 10 earns \$68,950.63 annually.

10. Although the parties agreed to enter the FVA job description as a joint exhibit, they did not stipulate to its accuracy.

11. The job requirements set forth in the Criminalist - Latent Prints job description, a member of the BPDDBS unit, are virtually identical, except that experience and certification in Latent Prints, rather than Video Forensics, is required.

Eliopoulos has a Bachelor's degree from Suffolk University in the humanities. He took some physics courses in college as requirements for the degree and worked in a college physics lab in high school. Eliopoulos admits, however, that while his undergraduate training may have provided a basis for his ability to do the job, his subsequent specialized training - which he did not learn in college - allows him to perform the specialized functions of his job.

The FVA job description lists the position's essential job functions. These duties, set forth below, are consistent with Eliopoulos' pay upgrade questionnaire and his testimony.

Under the direct supervision of ID and Photography, or their designee, the [FVA] will serve as a subject matter expert in the field of digital video evidence. Duties include, but are not limited to the following: examination of all multi-media evidence, including digital video evidence, to extract critical information; analyze and clarify various images; extract key areas from digital videos; examine, capture and decode all digital video files into an uncompressed video file; importing and exporting video formats utilizing a full assortment of desktop digital imaging software; communicating with investigators to determine points of interest; sign for/accept physical evidence; adhere to chain of custody procedure that tract [sic] the receipt, handling, securing and return of various video audio, digital and still photo evidence; process the media and prepare clear videotapes, video files, clips, digital-images and still shots; archive evidence and projects into database; properly label and disseminate all outgoing projects; document detail reports of processes associated with evidence; act as subject expert on various methods for extracting and saving the evidence gathered out in the field, provide witness testimony in courts of law; and other related duties as required.

Eliopoulos works a regular work day, Monday through Friday, 7:30 a.m. to 3:30 pm. His direct supervisor is Sergeant Walsh, who does not supervise him on a daily basis. Eliopoulos goes to Sergeant Walsh with questions and concerns and when he needs approval for training or a new piece of equipment. These interactions occur fewer than twelve times a year. Eliopoulos does not have regular daily interactions with Lt. Det. Maloney, Sgt. Walsh's supervisor or Captain Genevieve King, who heads the Forensics Unit. Eliopoulos does, however, prepare a monthly report for Captain King. This report is a summary of the cases and requests he completes, broken down by item number, incident type, unit requesting, officer/detective, date the work was performed, time invested and work performed.

For example, Eliopoulos' September 2011 report reflects that on September 1, at a sergeant detective's request, he spent four hours exporting homeland security footage to investigate a home invasion. That same day, he spent four hours investigating a child rape

case at a detective's request. Under "work performed," the report indicates that Eliopoulos transferred an audio cassette to a DVD, producing four copies. On September 13 and 14, at a detective's request, Eliopoulos spent four hours exporting 6 tiff and 6 jpeg files to investigate a "fraud - larceny by scheme" incident. He produced three CDs and two sets of stills. On September 27 and 28, at the request of a Homicide sergeant detective, Eliopoulos spent four hours exporting six stills to investigate a shooting. He produced two sets of still and three DVDs. The remaining twenty-two cases detailed in the report are similar - Eliopoulos produces CDs, stills or DVDs from existing audio or video clips or footage or audio files at a detective's request.

Eliopoulos' work does not involve programming or modifying the software he uses to analyze the evidence. Instead, he chooses from among the various sophisticated software tools he has to best analyze, enhance or clarify an image. He generally stays in his office or lab, as he refers to it, where all his equipment is located.<sup>12</sup> Eliopoulos does not go into the field or other detectives' offices to collect data.<sup>13</sup> He occasionally leaves his office to view cars in the BPD's evidence examination bay, or to discuss PhotoShop with a Latent Prints Unit employee who happens to be fluent with that software program. He does not, however, collaborate with BPDDBS members on cases. He has never testified in any court proceeding, although he was once subpoenaed.

Eliopoulos also conducts some training, both formal and informal. In 2008, he trained local merchants on effective use of surveillance equipment. In 2007 and 2011, he provided training to BPD detectives at police headquarters and to officers at the Boston Police Academy on what he does and how evidence should be collected in the field. Eliopoulos also informally advises detectives and investigators about collecting video field data. On the 2007 job questionnaire, he estimated he spent about 2% of his day giving such advice.

#### Opinion

Section 1 of the Law defines professional employee as:

Any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, (ii) involving the consistent exercise of discretion and judgment in its performance, (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospi-

12. During the hearing, Eliopoulos referred to his office as a laboratory, a term the other parties claim is inaccurate. The actual term used to describe the space in which Eliopoulos works and his equipment is housed is irrelevant because working in a laboratory, accredited or not, is not dispositive of professional employee status. Thus, in the earlier unit determination, we held that the forensic lab and forensic evidence technicians were not professional employees even though both worked in the Crime Lab. *City of Boston*, 36 MLC at 40.

13. Before 2008, when Eliopoulos did not have an evidence tracker, he would go to the Latent Prints Lab to obtain evidence.

14. The parties argue that Eliopoulos' request to reinvestigate is untimely and that, even if we were to find that he is professional employee, he does not share a community of interest with the other BPDDBS bargaining unit members. We rejected the timeliness argument in our October 11, 2011 ruling. With regard to the community of interest argument, we note that we previously opined that "it is reasonable to interpret the statutory grant of a separate vote among professional employees as a legislative determination that they share a particularly strong community of interest." *City of Boston*, 36 MLC at 38. We accordingly ordered an election among the petitioned-for employees "without further investigation or additional findings on bargaining unit conflict or other aspects of the community of interest standard." *Id.* at 39

tal, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes.

All four statutory criteria must be met to satisfy the definition. *Boston School Committee*, 25 MLC 160, 161 (1999) (citing *Commonwealth of Massachusetts*, 10 MLC 1162 (1983)). To be a professional employee within the meaning of the Law, the employee must perform work that requires at least three years of higher education leading to a specialized degree, and in most instances, certification, registration or licensing. *Boston Water and Sewer Commission*, 7 MLC 1438, 1448 (1980).

We have indicated in our earlier rulings in this matter that the sole issue for hearing is whether Eliopoulos is a professional employee. Eliopoulos argues that he meets the requisite statutory criteria. The other parties disagree and also oppose amending the certification on a number of other grounds, which we do not reach here in light of our conclusion that the FVA title is not professional.<sup>14</sup>

Our analysis focuses on the fourth element of the professional status test, advanced and specialized studies in a field of higher learning. Anticipating that the other parties would claim he is not a professional employee because he does not possess a Bachelor's degree in a specialized field or some type of certification, Eliopoulos urges the Board to look at the work that he is actually performing, rather than his individual qualifications in determining whether the FVA is a professional title. Eliopoulos also argues that the fact that the City created the FVA job description, which does require a specialized Bachelor's degree, two years after he was on the job demonstrates that the job itself requires the educational background set forth therein.

We agree, generally, that the Board looks to actual work duties when determining professional status. *See Marion School Committee*, 30 MLC 101, 102 (2004) (citing *Boston Water and Sewer Commission*, 7 MLC 1438, 1439 (1980)); *see also Avco Corp.*, 313 NLRB 1357 (1994) (citing *Western Electric Co.*, 126 NLRB 1346 (1960)) (Section 2(12)(a) of the N.L.R.A. defines a professional employee in terms of work performed, not in terms of individual qualifications).<sup>15</sup> However, we cannot completely ignore Eliopoulos' actual educational background here because it is central to the question of whether the work he performs requires the advanced, specialized studies needed to confer professional status. In cases involving groups of employees where some, but not all, possess the stated educational requirements, the NLRB looks at whether a majority of the employees in the title possess the requisite education. If they do, the NLRB will presume that this level of education is actually needed to perform the job and confer professional status even on those employees who do not possess the requisite requirements. Conversely, if a majority of employees do not have the level of education stated, it "logically follows that the work does not require the use of advanced knowledge." *Avco*, 313 NLRB at 1357-1358. We apply this approach in our analysis.

Here, Eliopoulos is the only FVA and he does not possess the level of education required by the job description. There is also no evidence and no party claims that Eliopoulos' lack of an advanced, specialized education or FVA certification has impeded him in any way from performing his job duties for the past four years. Indeed, Eliopoulos has never claimed that a specialized Bachelor's degree was required to perform his position. Rather, on his pay upgrade questionnaire he stated that only a four-year undergraduate degree from an accredited university was required. Moreover, Eliopoulos conceded at hearing that even this self-imposed requirement was too stringent insofar as the two organizations that confer FVA certification, LEVA and IAI, require only an Associate's degree. Ultimately, the fact that Eliopoulos has been performing the duties set forth in the FVA job description for four years without possessing the educational requirements set forth therein persuades us that the position does not require at least three years of higher education leading to a specialized degree.

Eliopoulos nevertheless argues that the similarity between the duties and educational requirements of his position and those of the Latent Print Criminalists and Senior Criminalists who are part of the BPDBS' unit supports a determination that he is a professional employee. However, in the 2009 decision, the parties stipulated that the Latent Prints Criminalists and Senior Criminalists were professional employees. The Board accepted these stipulations without further inquiry into whether those employees actually met or performed duties that required the use of advanced knowledge. A Board decision that adopts the parties' unit placement stipulation is not the legal equivalent of a Board unit placement decision where the issue was fully litigated. *Commonwealth of Massachusetts*, 25 MLC 121, 125, n.16 (1999) (citing *City of Springfield*, 24 MLC 50, 54 (1998)). Accordingly, certain similarities in educational requirements and with some of the duties the Latent Prints Specialists perform<sup>16</sup> do not, without more, persuade us that the FVA meets the requisite professional criteria.

Rather, as Local 888 argues, Eliopoulos meets the criteria for a technical employee. We have previously explained that "[a]lthough technical employees have some of the hallmark characteristics of professional employees, they do not meet the specific requirements for qualification as a professional employee." *Massachusetts Turnpike Authority*, 31 MLC 87, 108 (2004). The Board considers the following factors in determining technical employee status: 1) specialized training and knowledge; 2) performing work of a predominantly intellectual character requiring the use of independent judgment; 3) higher levels of skills and pay; and 4) usually but not necessarily licensing or certification by a state or private agency. *Id.* (citing *City of Worcester*, 6 MLC 1104, 1106 (1979) (additional citation omitted)). We find that all four factors are easily met here.

Eliopoulos counters this categorization by noting the similarities in his job duties to those of the Business Technology Specialist (BTS) in *Marion School Committee*, 30 MLC 101 (2004), which

15. The N.L.R.A.'s four-part definition of professional employee is identical to Chapter 150E's.

16. The Latent Prints criminalists and senior criminalists examine evidence for the presence or absence of latent impressions. Like the FVA, this examination includes digital enhancement techniques. Print analysis may also require using a variety of chemical techniques. 36 MLC at 36-37.

the Board included in the teacher's professional unit despite the employer's claim that this was a non-professional technical support position. In *Marion*, the Board focused on the title's "professional development activities," specifically finding that the BTS spent 20% of her time instructing students, and that the rest of her time was dedicated to training other teachers in the uses of technology, showing them how to integrate technology into teaching and student learning, and in curriculum development. The title also maintained computer networks. 30 MLC at 101. Although Eliopoulos notes that he too performs professional training for other BPD detectives and local merchants, the facts of *Marion School Committee* are easily distinguishable. While the Business Technology Specialist spent more than 20% of her time teaching students and training other teachers, *id.*, the record in this reveals only a few occasions in 2007 and 2011 when Eliopoulos performed department-wide or community training. Moreover, by his own 2007 estimate, Eliopoulos' informal advice to investigators and detectives comprises only 2% of his daily activities. The positions' educational requirements are also different. The Business Technology Specialist was a former teacher who held a Bachelor of Science degree in Business Education, a Master's Degree, and two Department of Education certifications, in Business and as an Industrial Technologist Specialist. *Id.* Eliopoulos does not possess similar advanced degrees or certifications, nor, as described above, is there any indication that the FVA title requires such educational background.

Ultimately, although Eliopoulos performs important, skilled work of an intellectual character requiring discretion, specialized training and knowledge, it does not require the level of knowledge set forth in the fourth criterion of Section 1's professional status definition.

#### Conclusion

Based on the record and for the reasons set forth above, we conclude that the FVA is not a professional employee within meaning of Section 1 of the Law. The Board therefore declines to amend the October 20, 2009 certification to include this title.

SO ORDERED.

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In the Matter of the Arbitration between SAUGUS SCHOOL  
COMMITTEE

and

AFSCME COUNCIL 93, AFL-CIO

ARB-054-2010

113.105 seniority

113.106 vacancies

113.31 arbitrability of grievance

January 11, 2012

Margaret M. Sullivan, Esq., Arbitrator

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#### INTRODUCTION

On December 18, 2009, AFSCME Council 93, AFL-CIO filed a unilateral petition for arbitration. Under the provisions of MGL Chapter 23C, Section 4, the Department of Labor Relations<sup>1</sup> (Department) appointed Margaret M. Sullivan, Esq. to act as a single neutral arbitrator with the full power of the Department. The undersigned Arbitrator conducted a hearing at the Department's office in Boston on July 28, 2011. The parties agreed to bifurcate the proceeding to have the arbitrator decide whether the grievance was arbitrable before the parties conducted a hearing on the merits of the grievance.

The Union was represented by Erin L. DeRenzis, Esq. and the Employer was represented by David M. Connelly, Esq.

The parties' briefs were postmarked October 14, 2011.

#### THE ISSUE

Is the grievance arbitrable?

#### RELEVANT CONTRACT LANGUAGE

The Union and the Employer were parties to a collective bargaining agreement that, by its terms, was in effect from July 1, 2006 through June 30, 2009 (2006-2009 Agreement). On November 18, 2010, the parties executed a memorandum of understanding that carried over the terms of the 2006-2009 Agreement for the period from July 1, 2009 through June 30, 2010 and included a 1% wage increase retroactive to July 1, 2009.

#### Article 7-Seniority: Job Posting and Bidding

Section 1 The length of service and anniversary date of employment shall determine the seniority of an employee. Provisional or emergency employees shall not be considered regular employees. Provisional employment will be applied toward seniority upon appointment on a permanent basis. A food service worker who becomes appointed will be paid on step one of the agreed upon salary scale. Seniority will apply only to Sections 2 and 3 of this Article.

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

Section 2 The principle of seniority shall apply to:

- A. Decrease of working force.
- B. Reassignment or the filling of vacancies.

Section 3 There shall be a job posting for the following:

- A. Temporary upgrading
- B. Change in hours worked
- C. Filling of a vacancy for any reason

The posting of the above matters shall be made in a conspicuous manner within fifteen (15) working days of the decision to fill the vacancy and interested employees shall have seven (7) working days in which to apply. The Food Service Director shall make the selection(s) within five (5) working days after the posting closes.

#### THE FACTS

Michelina Picozzi (Picozzi) was a cafeteria manager at the Employer's Lynnhurst School and a member of the Union's bargaining unit. On September 17, 2009, the Employer posted an opening for a cafeteria manager at the Veterans Memorial School for the 2009-2010 school year. Picozzi and three other unit members applied for the opening. Although Picozzi had the greatest seniority of the four candidates, Uri Harel (Harel), principal of the Veterans Memorial School, selected another candidate Barbara Malagodi to fill the vacancy. Thereafter, the Union filed a grievance on behalf of Picozzi protesting her failure to receive the position. On November 16, 2009, Harel denied the grievance at Step 1 of the contractual grievance-arbitration procedure, and Superintendent Richard Langlois (Langlois) denied the grievance at Step 2 on November 17, 2009.

#### POSITIONS OF THE PARTIES

##### *The Employer*

The principal of the Veterans Memorial School is vested with the ultimate authority under MGL c.71, §59B to determine whom to select for the cafeteria manager vacancy. Here, the Union contends that Article 7 of the current contract makes seniority the sole criterion for the filing of unit vacancies in the Saugus schools. However, a contract provision that mandates the selection of the most senior applicant is in material conflict with the principal's non-delegable right to make hiring decisions. Further, a conflicting contractual provision cannot override MGL c.71, §59B, because it is not one of the statutes enumerated in MGL c.150E, §7(d). Therefore, the grievance is not arbitrable.

##### *The Union*

Picozzi was the senior applicant for the vacant cafeteria manager position, and by virtue of her seniority, the position should have been awarded to her. The Supreme Judicial Court (SJC) previously has ruled that personnel policies related to terms and conditions of employment remain properly the subject of collective bargaining agreements between an employer and an employee bargaining representative. See *School Committee of Pittsfield v. United Educators of Pittsfield (Pittsfield)*, 438 Mass. 753 (2003). The transfer of Picozzi from one cafeteria manager position to another comparable position does not usurp the authority of the Veterans Memorial School principal and would not conflict with MGL c.71, §59B. If the School Committee were to prevail on the

defense that the grievance is not arbitrable, the Union would be deprived of the benefit of the language in Article 7 for which it had bargained in good faith. Thus, the grievance is arbitrable and should proceed to a hearing on its merits.

#### OPINION

Massachusetts courts have consistently held that personnel-related procedures may be open to collective bargaining, and that the bargained-for procedure will be enforced so long as it does not result in an abdication of the school committee's, or a principal's, statutory authority. *School Committee of Newton v. Newton School Custodians Association, Local 454, SEIU (Newton)*, 438 Mass. 739, 747 (2003). Pursuant to the Union's interpretation of Article 7, Picozzi should have received the vacant cafeteria manager position at the Veterans Memorial School, because she was the candidate with the greatest seniority. However, the Employer contends that the alleged requirement that the most senior candidate receive a vacant position pursuant to Article 7 infringes upon the discretion that MGL c.71, §59B grants to principals to select personnel in their schools.

First, I must determine whether the subject matter of Picozzi's grievance, a voluntary transfer, is the type of personnel action over which a principal has discretion to select an applicant pursuant to MGL c. 71, §59B. MGL c. 71, §59B states in pertinent part:

Principals employed under this section shall be responsible, consistent with district personnel policies and budgetary restrictions and subject to the approval of the superintendent, for hiring all teachers, athletic coaches, instructional or administrative aides, and other personnel assigned to the school, and for terminating all such personnel, subject to review and prior approval by the superintendent and subject to the provisions of this chapter.

In the *Pittsfield* case, the SJC determined that the term "hiring" as used in MGL c.71, §59B encompasses voluntary transfers. *School Committee of Pittsfield*, 438 Mass. at 762-763 (citing to *School Comm. of Lowell v. Local 159, Service Employees Int'l Union*, 42 Mass. App. Ct. 690, 693-694 (1997)). The SJC in the *Pittsfield* case noted that:

A voluntary transfer ... is an affirmative application made by an employee to move from one school to another. It is, in essence, an application to be hired for a new or different position. In the case of voluntary transfers, a process allowing the applicant to change jobs without the consent of the principal of the transferee school would impair the prerogatives of principals as managers of their schools. *Id.* at 763.

Thus, the subject matter of Picozzi's grievance, a voluntary transfer, is the type of personnel action that implicates a school principal's discretion.

Next, I must ascertain whether the language of Article 7 arguably infringes upon the Veterans Memorial School principal's discretion to select a candidate to fill a vacancy. A review of the language of Article 7 reveals that the principle of seniority is the only criterion listed for the filling of vacancies. Because Article 7 lists only one criterion that a school principal can consider when filling a vacancy, the provision encroaches upon a school principal's right to make selections by dictating the choice of a certain individual. In

contrast, the disputed contractual language in the *Newton* case did not remove from the principal the actual first line determination of whom to hire. *School Committee of Newton*, 439 Mass. at 748-749. The SJC described the disputed contractual language in the *Newton* case as at most, requiring “the principal to make a good faith effort to evaluate a job applicant’s qualifications in four enumerated areas, and to resort to seniority if the principal independently determines that the candidates stand on identical footing with respect to the other more subjective criteria.” *Id.* at 749. Furthermore, the language in Article 7 recognizes no right of approval by the principal and superintendent for any candidate selected pursuant to the procedure contained therein. *See School Committee of Lowell*, 42 Mass. App. Ct. at 693 (procedures for filling vacancies do not infringe upon the powers of the principal and the superintendent so long as they retain the right of approval of the employee selected pursuant to those procedures.) Finally, the language of Article 7 must yield to MGL c.71, §59B because MGL c.71, §59B is not one of the statutes specifically enumerated in MGL c.150E, §7(d), over which collective bargaining agreements prevail.

Because I have found that the transfer language of Article 7 is inconsistent with MGL c.71, §59B, I conclude that the grievance is not substantively arbitrable. The grievance is denied.

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The Department, having afforded the parties full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at the hearing, has considered the issues, and having studied and weighed the evidence bearing on the issues, awards as follows:

AWARD

The grievance is substantively non-arbitrable. The grievance is denied.

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In the Matter of TOWN OF EAST BRIDGEWATER and EAST BRIDGEWATER SCHOOL COMMITTEE

AND

EAST BRIDGEWATER EDUCATION ASSOCIATION

Case Nos. MUP-07D-5095 and MUP-07D-5115

- 54.611 health insurance
- 67.8 unilateral change by employer
- 82.3 status quo ante
- 91.11 statute of limitations

January 13, 2012

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

Daniel C. Brown, Esq. Town of East Bridgewater/ East  
Bridgewater School Committee  
Will Evans, Esq. East Bridgewater Education  
Association

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Summary

This case provides the Board with an opportunity to clarify when the six-month period of limitations set forth in 456 CMR 15.03 begins to run in unilateral change cases, when an employer provides a union with advance notification of the change and the parties subsequently bargain. We affirm the Hearing Officer’s ruling that the charge was timely and hold that in cases where a union is not presented with a *fait accompli*, the union makes a timely demand to bargain and the parties subsequently bargain, the period of limitations begins to run on the date the union has actual or constructive knowledge that the change will be implemented prior to the parties having bargained to resolution or impasse.

Statement of the Case

On November 19 and December 19, 2007, the East Bridgewater Education Association (Union) filed charges of prohibited practice with the Department of Labor Relations (Department)<sup>1</sup> against the Respondents Town of East Bridgewater (Town) and the School Committee (School Committee), alleging that they had engaged in prohibited practices within the meaning of Section 10(a)(5) and derivatively, Section 10(a)(1) of MGL c. 150E (the Law) by increasing health insurance co-payments without giving the Association an opportunity to bargain to resolution or impasse. The Department issued a complaint alleging that the Respondents violated the Law by unilaterally increasing co-payments and the

1. Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations is now called the Department of Labor Relations. References to the Department include the former Division.