

## CITY OF MALDEN AND TEAMSTERS, LOCAL UNION NO. 122, MCR-3287 (6/21/82).

- (10 Definitions)  
 12. Municipal Employee  
 13. Municipal Employer  
 (30 Bargaining Unit Determination)  
 43.1 appropriate unit  
 34.2 community of interest

## Commissioners participating:

Phillips Axten, Chairman  
 Joan G. Dolan, Commissioner  
 Gary D. Altman, Commissioner

## Appearances:

- George W. Shinney, Jr., Esq. - Representing City of Malden Retirement Board  
 Stephen R. Domesick, Esq. - Representing Teamsters, Local Union No. 122

DECISIONStatement of the Case

This case began when Teamsters, Local Union No. 122 (Union) filed a petition with the Labor Relations Commission (Commission) seeking to represent clerical employees of the City of Malden (City). An election held on April 16, 1982 produced a vote of 18 for the Union; 18 for no representative; 11 challenges; timely objections from the Union; untimely and subsequently dismissed objections from the City; and three conferences at the Commission in an attempt to resolve the many pending matters as efficiently as possible. The conferences produced withdrawal of the objections, an agreement for a re-run election to be held on June 11, 1982, and the resolution of all outstanding matters except the status of two clerical employees working in the office of the Malden Retirement Board (Board).

The Union and the City agreed to a proceeding under the Commission's accelerated Decision Process in an effort to determine prior to the June 11 election whether the two individuals are employees of the City or of the Board for purposes of General Laws Chapter 150E (Law). The Board was not a party to this agreement and subsequently sought to present its views on the matter in question. At the last conference on this case, the Commission through its investigator informed the parties that a formal hearing would be held instead and that the two employees at issue would vote on June 11 subject to Commission challenge unless it was possible for the Commission to conclusively determine their status prior to the June 11 election.

On June 1, 1982, Commissioner Joan G. Dolan conducted the formal hearing. The Board and the Union were present and represented by counsel, who presented evidence and examined and cross-examined witnesses. The City did not file an appearance, but limited its involvement to a single witness' statement of the City's position that the employees are not City employees but Board employees. The Union



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Board argued the case orally at the close of hearing; no briefs were filed.

On the basis of the record and arguments, we hold that employees Neville and [redacted] are employees of the City of Malden.

Facts

Chapter 32 of the General Laws is the statutory scheme regulating public employee contributory retirement systems. Section 28 of Chapter 32 states that Chapter 32 is a local option law. There was a retirement system in Malden during the 1930s. In approximately 1947, the City's voters accepted Chapter 32.

City systems are managed by a retirement board such as the Board involved in this case. By statute,<sup>1</sup> each board must consist of three members. The city auditor or comparable official serves as an ex officio member with full voting rights. The third member is elected by current employees and retirees. She or he serves for a term determined by the mayor, which is limited by statute to three years. The second member is chosen by the other two for a three-year term. If the third member is not chosen by the other two within thirty days after the vacancy occurs, a person is appointed by the mayor subject to confirmation by the city council. In Malden, James Cummings is the elected member and Board chairman, Leonard Greene is the second member by virtue of his position as City Controller of Accounts, and Westford Robbins is the member selected by Messrs. Cummings and Greene. Mr. Robbins and Mr. Cummings serve on a part-time basis. Mr. Greene has an office in Malden City at the same location as the Board's. He has day-to-day oversight responsibility for the Board's operation and signs all of its warrants.

The essential job of the Board is to administer the Malden contributory retirement system for employees of the City, the Malden Housing Authority, and the Malden Redevelopment Authority. Board personnel process applications and compute benefits in accordance with the terms set by Chapter 32. In order to fulfill its duties, the Board has the power<sup>2</sup> to take evidence, subpoena witnesses, and examine books and records.

Chapter 32 mandates fiscal autonomy for retirement systems. Basically, the Board annually submits to the Commonwealth's Commissioner of Insurance demographic and financial data pertaining to the employees and retirees who belong to the system. In response, an actuary from the state Division of Insurance returns a certificate stating the amount required to be appropriated in order to meet the system's benefit obligations. The Board adds expenses it deems necessary for operating needs. The certificate then goes to the mayor and city council. Unlike City department budgets which can be cut, the Board's financial needs must be met by the City. Should any

<sup>1</sup>Chapter 32, Section 20(4)(b).

<sup>2</sup>Chapter 32, Section 20(5)(b).



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monies be cut from the Board's budget, the Board has the statutory power to certify to the City Board of Assessors the deficiency to be raised on the City's tax rate. These sums must then be included in the tax recapitulation. If they are not, the board may sue the City to recover the sums needed for operation of the system.<sup>3</sup> On at least two occasions, money was deleted from the Board's budget, the certification process was followed, and the monies were raised.

The Board's budgetary process is unique among City departments and agencies. In addition to the autonomy described above, the Board bills the City and the Malden Housing and redevelopment authorities for their respective shares of the money necessary to fund the system's benefit payments and operating expenses. The Board's own bills are paid pursuant to Contributory Retirement System treasury warrants; the City's bills are paid pursuant to City treasury warrants. Board funds are maintained in a bank chosen by the Board. City funds are in a different bank chosen by the City. On this record, the only other City department with financing different from the usual City approach is the water department. Customers are charged for water. The money generated cannot exceed the costs involved. All monies received go into the City's general fund.

The Board's offices are located in Malden City Hall. Helen Eggleston is the manager and secretary to the Board. Jean Neville and Kathleen Schulz perform clerk and machine operator duties. Eggleston's basic salary is supplemented by \$2,000 he receives for serving as the Board's secretary. City Treasurer Jean Carroll receives \$1500 for her Chapter 32-mandated duties as treasurer of the Board and custodian of its accounts. Controller Greene is paid \$3,000 for his statutory service as Controller of the Board. The Board also may hire counsel when it determines that representation by the City Solicitor would be inappropriate.

Employees Neville and Schulz are the employees at issue in this case. Neville was hired approximately five years ago at a time when she was employed as a clerk by the Malden Fire Department. At the time, the City of Malden salary ordinance provided for a maximum salary of \$9500 for an employee in Neville's category. At the time of her hire by the Board, Neville was making \$10,000 in the Fire Department, a sum denominated as including \$500 for Civil Defense duties in addition to the maximum City salary of \$9500. As a condition of her hire, the Board met her previous salary of \$10,000. Her salary has continued at a level several hundred dollars higher than City ordinance maximum salaries. Kathleen Schulz has been employed by the Board for two to three years. Her salary appears to be within the range of City ordinance salaries for people in her position. With the exception of this salary differential, the people working in the Board's office receive the same benefits as City employees, although they are not required to submit doctors' letters for absences as City clerical employees are. Specifically, employees in the Board office work the same hours, and have the same holidays, lunch periods, sick days, and vacations as City employees. They are also eligible for retirement,

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<sup>3</sup>Chapter 32, Section 22(7)(iv).



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union, health and life insurance benefits on the same basis as City employees. Neville and Schulz are not hired as Civil Service employees. Generally, City employees also have Civil Service status. There has never been a problem which would require Civil Service coverage for employees in Neville's and Schulz's positions.

Chapter 32, Section 20(4)(d) states that retirement boards shall employ such clerical and other assistants as may be required to transact the business of the board. In Malden, the Board keeps its own payroll deduction records and pays employees biweekly rather than weekly, as is the practice for City employees. Paychecks are issued in an account entitled "Office of City Treasurer City of Malden Contributory Retirement Fund," as opposed to the City accounts labeled "City of Malden." The Board also purchases goods and services independently, rather than through the City purchasing department. The Board is not required to maintain offices in City Hall, although it does so. The Board does not pay any rent, gas, light, or phone expenses for its City Hall office. Although employees Neville and Schulz enjoy the same benefits as City employees, there has never been an order from a mayor that Board employees are bound by City employment laws. There was a recent incident involving City Hall switchboard substitute employees. When the mayor issued an order that all City clericals cover the board switchboard, the Board protested. An agreement was reached between the mayor and the Board in which the Board agreed voluntarily to allow Neville and Schulz to fill the switchboard.

In other City departments and agencies, department heads, boards, or commissions make hiring decisions. The basic difference between the Board and other departments or agencies lies in the budgetary structure. No other board or commission has the fiscal autonomy possessed by the Board. Additionally, no other City department is subject to control by the Commonwealth's Commissioner of Insurance.<sup>4</sup>

#### Opinion

The bargaining unit sought by the Union in this case includes clerical employees of the City. If employees Neville and Schulz are employees of the City, they are members of the unit. If they are employees of the Board, they are not employees of the City clerical unit and hence ineligible for unit membership. The Board argues that they are City employees; the City and the Board argue that they are Board employees. Based on the interpretation of Chapter 150E, Section 1 discussed below, we hold that they are City employees.

Section 1 of the Law defines "Employee" fundamentally as any person employed by a public employer. Until the passage of Chapter 484 of the Acts of 1981, a "public employer" was defined in the relevant part of Section 1 of the Law as the Commonwealth acting through the commissioner of administration, or any

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<sup>4</sup>Chapter 32, Section 24 gives the Commissioner of Insurance the power to compel compliance with Chapter 32 through the Attorney General and the Superior Court.



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county, city, town or district acting through its chief executive officer, and any individual who is designated to represent one of these employers and act in its interest in dealing with public employees. Chapter 484 of the Acts of 1981 amended the prior definition of "public employer." The definition now reads in relevant part:

"Employer" or "public employer," the commonwealth acting through the commissioner of administration, or any county, city, town, district, or other political subdivision acting through its chief executive officer, and any individual who is designated to represent one of these employers and act in its interest in dealing with public employees, but excluding authorities created pursuant to chapter one hundred and sixty-one A and those authorities included under the provisions of chapter seven hundred and sixty of the acts of nineteen hundred and sixty-two. (Changes underlined)

Chapter 161A refers to the Massachusetts Bay Transportation Authority. Chapter 760 of the Acts of 1962 covers the Massachusetts Turnpike, Port, and Parking Authorities, and the Woods' Hole, Martha's Vineyard and Nantucket Steamship Authority. All of these authorities are subject in some measure to Chapter 150A, the labor law governing private sector employees.

The Union argues that employees Neville and Schulz are employees of the City in that the City and the Board are either a joint or a merged entity. It contends that the Board is not itself a "public employer" within the statutory definition. Essentially, the Union views the Board as a clerical surrogate of the City for the purpose of administering the statutory retirement program. As the Union colloquially states it, "You can't tell these [Board] players from other clericals unless we give them different jerseys." The Union contends that it would be unjust to exclude these two employees from bargaining as members of the City clerical unit.

The Board views the situation differently. It argues that the City and the Board are two separate entities, and that Neville and Schulz are not City employees. Because of its autonomy, the Board contends that it is like a housing or redevelopment authority. Without specific inclusion of retirement boards in Chapter 150E, says the Board, it is exempt from coverage under the principles stated in Fall River Housing Authority, 4 MLC 1690 (1978). The Board further argues that the Mayor cannot bind the Board, so inclusion of the two employees in the City unit would not achieve meaningful representation for them. Nor, alleges the Board, would representation in the City unit be effective for the two employees because one of them is paid a salary higher than the City scale and two minority employees in a large unit would suffer. The Board finds no supervision, pay scale, hiring practices, or job security community of interest between Neville and Schulz and individuals who are clearly City employees.

We hold that clericals working in the Board's office are employees of the City of Malden under principles in existence long before the 1981 amendment to the "public employer" definition. Thus, we need not discuss the changes since they are not material to the outcome of this case.



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On several occasions in the past, the Commission has considered cases in which it was contended that employees working in a municipal department or commission, for purposes of the collective bargaining laws, employees of the department rather than of the municipality. In all such cases, the individuals to whom the employees reported were, by statute, elected or appointed officials. The parent departments or commissions were established by statutes which often covered hiring and firing authority, means of funding, and authority to direct. Only where the facts have indicated a substantial and well-established degree of control over the employees different from that of the usual board member or commissioner and a real sense of separation and autonomy have we found the employees in such cases to be employees of the department rather than of the municipality. Town of Marblehead, 1240 (1980). In the vast majority of these cases involving conflicts between municipalities and their statutory boards, agencies, and commissions, we have found the employees at issue to be employees of the municipality. Town of Cohasset, 1240 (1980); Department of Public Works, 1 MLC 1184 (1974); Town of Harwich, 1 MLC 1376 (1975); City of Uxbridge, 6 MLC 1471 (1979). The case before us falls squarely into the latter category.

The Board points to Chapter 32, Section 20(4)(d) stating that retirement benefits shall apply to all employees of the city or town, including those who shall employ such clerical and other assistants as may be required to conduct the system's business. We cannot find this provision a compelling ground for terminating that the Board is the Chapter 150E public employer here, any more than we could so find comparable provisions for other departments involved in cases of this type. See Town of Cohasset, *supra*; Town of Uxbridge, *supra*. Additionally, we note that Chapter 41 of the General Laws, "Officers and Employees of Cities, Towns, and Districts" contains a vast array of specifications of municipal officials and their powers common to employers. Statutory authorization for officers to hire, employ, and terminate individuals cannot conclusively determine an employee's status. Most of these statutes were, like Chapter 32, passed long before the advent of collective bargaining, and they may be seen as a grant of more than grants of legal authority to spend public monies for the performance of public tasks. Additionally, were we to adopt the approach suggested by the Board, we would undo almost twenty years of municipal collective bargaining by giving a crazy quilt of many public employers of employees, all performing work for the city or town.

There is virtually nothing in this record establishing the independence necessary to qualify the Board as a public employer under Chapter 150E. The hiring of employees is done by Board members. The evidence establishes that hiring decisions in all City boards, commissions, and agencies is done by their respective boards. In terms of the everyday elements of Neville and Schulz's work life, they are all important respects identical to those of other employees performing similar duties in City Hall. The Board simply failed to establish any independent action on its part which would negate the virtually total application of City employment policies to the employees in question. Although Chairman Cummings testified that the Board had certain policies on working conditions and benefits, we cannot give this testimony any weight since the Board failed to produce the alleged policies and Mr. Cummings' account of them was not comprehensive. This is not surprising because of the part-time nature of two of the Board members'



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service. It was clear from the record that City Controller Greene was the person with the most knowledge of and daily responsibility for the Board's operations. Mr. Greene testified unequivocally that employees working in the Board office have virtually the same benefits and working conditions as other City employees.

Much time was devoted to the contention that employee Neville's salary level established that the Board was an autonomous employer. Neville had been a clerical employee of the Malden Fire Department prior to her hire by the Board. At the Fire Department, she was making \$10,000 a year at a time when the maximum salary by City ordinance was \$9500. The extra \$500 was denominated as payment for Civil Defense duties. The Board hired her at \$10,000, and alleged here that its ability to pay salaries above the City maximum establishes its control over Board clericals. Aside from the fact that employee Schulz appears on the evidence to be paid in accordance with the City ordinance, the argument on Neville simply does not establish the Board's point. Those familiar with public sector labor relations know that there is often a range of flexible approaches available to departments to meet salary requirements of non-unionized employees. What we know of this record is that Neville was making \$10,000 as a Fire Department clerical and was hired as a Board clerical for \$10,000. The statement that \$500 of her Fire Department salary was for Civil Defense duties does not undercut the clear fact that as an undisputed City clerical she was paid \$500 more than the City salary ordinance for her classification. For all we know on this record, such arrangements are common throughout the City clerical unit.

Much was also made of an incident in which the Mayor of Malden ordered that City clericals fill in on the City Hall switchboard. When Board members protested, an agreement was worked out so that the Board volunteered Neville and Schulz to fill in on the switchboard as other City clericals do. We can find no legal significance in this episode. Any Board member, commissioner, or agency head might similarly protest. The resolution of the conflict reveals merely a successful attempt to smooth the waters and end a dispute.

The Board's other major point is that its unique budgetary process justifies its status as a public employer. Chapter 32 contains many safeguards for the considerable sums of money involved in pension funds, among them fiscal autonomy so that payment of pension obligations will be guaranteed. Also included is a superintendency outside City channels in the form of certain controls exercised by the Commissioner of Insurance. The fact that the Board's budgetary processes are unique is immaterial to the question of who the public employer is in this case. Employees Neville and Schulz are, like all City clericals, paid from monies raised through tax levies. The method by which the Board's budget proceeds through City funding mechanisms is no more determinative of employer status than is the fact that the City water department pays for itself through customer charges.

Thus, we do not find on these facts that the Board is the Chapter 150E public employer of these employees. In dealing with the parties' remaining arguments we must turn to Section 3 of the Law. This provision mandates that we create bargaining units "consistent with the purposes of providing for stable and continuing labor relations, giving due regard to such criteria as community of interest,



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ency of operations and effective dealings, and to safeguarding the rights of employees to effective representation." The parties had argued divergent views on applicability of each of the statutory criteria to the facts of this case. In consideration of their positions, we rule that the statutory requirements must be satisfied by including Neville and Schulz in the City clerical unit.

Although the Board argues that the employees do not share a community of interest with other City Hall clericals, the facts simply do not support this position. As is well-established in our law, community of interest does not mean identity of interest. It does mean that the employees sought in a unit share common working conditions and interests which would be involved in collective bargaining. Town of Harwich, 1 MLC 1376 (1975); Community Colleges, 1 MLC 1426

The facts here are that Neville and Schulz have virtually the same working conditions and benefits as all other City clericals. They do not share common supervision with other clericals, any more than a clerical in the water department common supervision with a clerical performing the same tasks in the licensing department. In fact, the only conditions unique to clericals working in the City office are that they are not required to bring doctor's letters for absences and they are paid bi-weekly rather than weekly. We find both of these minor factors insufficient to destroy the compelling community of interest between Neville and Schulz and other City Hall clericals. Our experience with the many cases involving doctor's letters indicates that a requirement of this type is not a great enforcement variation within different departments of the same municipality. The mere statement that there is some difference is inadequate, particularly where the point is not highly significant. In terms of the bi-weekly rather than weekly pay schedule, the Board presented no evidence that it could not pay Neville and Schulz on a weekly basis if such was negotiated. Nor, for that matter, is it possible to preserve the existing disparity in the context of bargaining.

In terms of the statutory purpose of ensuring effective representation to employees, Neville and Schulz clearly belong in the City unit. In contrast to the Board's argument, the fact is that they would no more be minority employees in the City than any other clericals employed in a small City board, agency, or commission. Again, Neville's alleged salary disparity also does not lead to a claim of discrimination in a collective bargaining context. In new bargaining relationships, there are often initial salary disparities which are worked out over time. Additionally, given the salary ranges in the City ordinance, it is probable, absent any evidence, that there will be a range of salary disparities throughout this ordinance. As to job security or discipline issues, negotiated grievance and job security provisions would be in no way affected by the fact that these employees report to members of the Board, as opposed to some other commissioners, department heads, or board members. In short, there is no reason whatsoever that their interests would not be adequately represented if they are included in the City unit.

In terms of efficiency of operations and effective dealings, it is obvious from the record that the City's approach to its clerical employees applies virtually equally to the board to clericals working in the Board's office. To sever these employees would produce the very concerns about balkanization, rival units, and the ineffectiveness of small bargaining units that we and the courts have long worked to





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avoid. Jordan Marsh Co. v. Labor Relations Commission, 316 Mass. 748 (1944); Cohasset Department of Public Works, 1 MLC 1184 (1974).

Conclusion

Our examination of the facts and the law involved in this case leads us to conclude that Neville and Schulz belong in a City clerical unit for collective bargaining purposes. In doing so, we borrow some early advisory statements issued by the Commission which are readily transplanted into City rather than Town terms:

To require that the Board of Selectmen sit down at the bargaining table with the collective bargaining representatives of their employees, even though they may represent members of several Town departments, does not amount to a surrender upon the part of the several department heads of the powers and prerogatives which are rightfully theirs. Each of the respective department heads continue to be responsible to the electorate as before. To be sure, each of the several departments has its peculiar problems, and a prudent chief executive would take such into account. The Commission has often advised selectmen, as chief executives, to regularly consult with other elected and appointed officials so that a workable contract can be executed under which all affected parties may efficiently live and work. Town of Cohasset, Dept. of Public Works, 1 MLC 1184, 1186.

COMMONWEALTH OF MASSACHUSETTS  
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, Chairman

JOAN G. DOLAN, Commissioner

GARY D. ALTMAN, Commissioner

