

TOWN OF WELFLEET AND TEAMSTERS, LOCAL 59, MCR-3406 (10/24/84). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

- 35.1 casual and temporary employees
- 35.2 confidential employees
- 35.7 supervisory and managerial employees
- 92.51 appeals to full commission

Commissioners Participating:

Paul T. Edgar, Chairman
Gary D. Altman, Commissioner

Appearances:

- William M. Straus, Esq. - Representing the Teamsters, Chauffeurs, Warehousemen and Helpers, Local 59
- Leonard Kopelman, Esq. - Representing the Town of Welfleet

DECISION

Statement of the Case

Hearing Officer Amy Davidson issued her decision in the above-captioned matter on March 19, 1984.¹ She directed that an election be held for the purpose of determining whether a majority of certain employees in the Town of Welfleet (Town) desire to be represented by the Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 59 (Union), or by no employee organization. In establishing appropriate bargaining units, the hearing officer ruled that neither the Harbor Master, Building Inspector, Shellfish Constable nor the Park Foreman are managerial. Thus, they were not excluded from the bargaining unit of supervisors. She further decided that the Clerk, Board of Selectmen was not confidential and thus was not excluded from a unit of non-supervisors. Finally, she concluded that two other positions sought by the Union were seasonal and should not be placed in the unit. The Town filed a timely notice of appeal of the hearing officer's decision and a supplementary statement pursuant to Commission Rule 402 CMR 13.13(2). The Union did not file an appeal.² Based on the record and for the reasons set forth below, we affirm the decision of the hearing officer, except we include one employee that she excluded from coverage.

¹The full text of the hearing officer's opinion is reported at 10 MLC 1456 (H.O. 1984).

²The Union did file a supplementary statement in response to that of the Town. In its statement the Union objected to two of the hearing officer's conclusions of Law. It argued that it would be more appropriate to have one unit rather than separating the supervisors. It also argued that the hearing officer erred in not including certain seasonal employees in the unit.



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Findings of Fact

The Town claims that the hearing officer made erroneous findings of fact. Although the Town identified the challenged conclusions, it did not direct the Commission to any specific evidence in support of its claim, as required by Commission Rule 402 CMR 13.13(5).³ It did address the Commission's attention to the taped transcripts as a whole, but such a vague reference does not satisfy the requirements of Rule 13. Hadley School Committee, 7 MLC 1632 (1980). Nonetheless, after a complete review of all the offered evidence, it appears that the hearing officer's findings of fact are complete and accurate, and that the Town was really contesting the weight given to those facts.

In its appeal, the Town argues that four of the five positions placed in the supervisory unit should be excluded because they are actually managerial. It also claims that the Clerk to the Board of Selectmen is confidential and thus should have also been excluded from either unit. The duties of the positions in question may be summarized as follows:

1. Harbor Master

The Harbor Master is responsible for the overall management, maintenance and safety of the moorings of the Wellfleet Marina. The Harbor Master has the authority to regulate the anchoring of all vessels that enter the harbor, G.L. c.102, Section 21, and anyone who violates the lawful orders of a harbor master may be punished with a fine. G.L. c.102, Section 28. He supervises several Assistant Harbor Masters and recommends candidates for those positions to the Board of Selectmen. He is responsible for all Marina books and receipts, and he formulates a department budget which is submitted to the Selectmen and the Marina Advisory Board for their approval. The Harbor Master makes recommendations regarding potential changes in Marina policy, especially regarding fees charged for use of the Marina. The ultimate authority to hire, fire and set policy, however, rests with the Board of Selectmen.

2. Building Inspector

Under General Laws, Chapter 143, Section 3, the Building Inspector is responsible for issuing and reviewing all building permits. He is further responsible for enforcing the State Building Code and zoning laws and for inspecting buildings and building sites.

3. Shellfish Constable

The Shellfish Constable enforces shellfishing regulations and cultivates shellfish. He formulates a proposed department budget which is submitted to the

³However, the Town did offer some new evidence in the form of statutory citations. The statutes describe many of the duties and powers of the positions in question. Because the additional facts do not alter our view of the case, they will be included in the record on review.



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Board of Selectmen for their approval and he is empowered by statute to manage shellfisheries and to arrest people who violate shellfishing regulations. G.L. c.130, Section 98. During the summer months, the Shellfish Constable has three or four laborers working under him.

4. Park Foreman

The duties of the Park Foreman involve maintaining the Town's public beaches and their facilities. During the summer months, the Foreman assigns work to the three to five seasonal employees who assist him. During the winter months, he fills in for the custodian when necessary and does most of the odd jobs that arise in Town.

5. Clerk, Board of Selectmen

This position is currently held by Mary Ann Nickerson who works 2-1/2 days per week as Clerk and 2-1/2 days per week as the Assistant to the Administrative Assistant to the Selectmen.⁴ As Clerk, Nickerson does bookkeeping, accounting, and payroll. As the Assistant to the Administrative Assistant to the Selectmen, Nickerson occasionally fills in for the Administrative Assistant when she is ill or on vacation. By doing so she can become privy to incoming correspondence to the Board of Selectmen. Such correspondence may include negotiation minutes. Nickerson may also be called on to take notes at executive sessions of the Board of Selectmen when the Administrative Assistant is out.

6. Seasonal Employees⁵

Every year Wellfleet hires a number of workers for the summer months. The summer employees change from year to year and receive neither sick leave nor vacation pay and are not covered by the Town's health insurance plan. In addition, there are two positions that are funded for periods longer than the summer. The Park Department Maintenance Engineer (apparently also known as a Park Department Laborer) is funded for six months. The person who filled the position at the time of the hearing, Edward Lynch, has returned for three consecutive years to the same position. Similar to the summer seasonals, he receives no benefits.⁶ In 1983, the Town also

⁴The position of Administrative Assistant to the Selectmen was excluded from either unit by stipulation of the parties.

⁵Although the Union made arguments in its supplementary statement on the unit placement of the two "seasonal" employees excluded from the unit by the hearing officer, it did not file a Notice of Appeal. Despite its failure to appeal, the Commission will nevertheless consider the issue. Both Parties argued the issue to the hearing officer. Moreover, it is the Commission's responsibility under Section 3 of the Law to establish appropriate bargaining units. Accordingly, the Commission has the statutory responsibility to review the legal question on the seasonal status of the two employees.

⁶The record is unclear whether Lynch participates in the retirement system.



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created another Park-Department Laborer position. The position was funded from June 1, to October 15, 1983 and it was intended that it last for only one year. The person who fills the position, David Balch, is responsible for maintaining the Town landfill. The record does not reflect whether the job was filled in 1984. The Union sought to include both positions in the unit.

Opinion

A. Managerial Status

The Town argues that the Harbor Master, Shellfish Constable, Building Inspector and Park Foreman are all managerial employees. As defined by Section 1 of Chapter 150E, employees are managerial "only if they (a) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer, or (c) have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration." Thus, just because an employee exercises some supervisory authority does not mean that he or she is managerial. University of Massachusetts, 3 MLC 1179 (1976).

Because none of these employees participate in collective bargaining or in the grievance process, the Town relies solely on part (a) of Section 1 in arguing that they are managerial. The Town claims that the employees make final decisions that significantly impact the public. "[T]o be considered as policy, the decision must impact a significant part of the public enterprise." Worcester School Committee, 3 MLC 1653, 1672 (1977). "Attendance and participation and periodic discussions with higher administrators on major policy matters does not constitute policy formulation or determination." Id.

The Harbor Master, Shellfish Constable and Park Foreman all formulate proposed budgets for their respective departments. None of them has the authority to implement the budget or any fiscal changes without the approval of the Board of Selectmen. The Harbor Master's proposed budget must also be approved by Marine Advisory Board.

The Harbor Master also recommends fees that should be charged to those who use the Marina. Again, however, he cannot implement a change in fees without approval from the Selectmen. This sort of advisory role is insufficient to render the Harbor Master a manager. Worcester School Committee, 3 MLC 1653 (1977); Town of Needham School Committee, 3 MLC 1251 (1976).

The Harbor Master position considered in Town of Scituate, 7 MLC 1281 (H.O. 1981), aff'd. in relevant part, 7 MLC 2120 (1981) had duties virtually identical to those of Wellfleet's. There the Harbor Master was not considered to be managerial because his job duties did not meet the statutory requirements for exclusion in that his decisions did not impact a significant part of the public enterprise.

The Town deems it material that the Harbor Master and Shellfish Constable have the statutory power to arrest or to otherwise invoke criminal sanctions of the



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Commonwealth. However, police officers also have the power to arrest those who violate their orders, but that does not mean they are thereby considered managers.

The hearing officer ruled that the record was devoid of any reason for excluding the Building Inspector as managerial. The Town claims this is incorrect, in part because the Inspector has one of the most important positions in the Town and because he may not be overruled by the Board of Selectmen. Even if this were true, it would not invalidate the hearing officer's decision. Nonetheless, it should be noted that the Town's claim seems somewhat dubious. The Town's own and sole witness, Gerald Houk,⁷ stated that the Inspector is responsible directly to the Board of Selectmen. Furthermore, it is statutorily mandated that the Building Inspector is solely and directly responsible to the person or public body that appointed him. G.L. c.143, Section 3. Thus, whether or not the Selectmen can overrule him, the Inspector is directly responsible to them⁸ and has authority insufficient to consider him managerial.

A previous hearing officer decision involving a building inspector also found the position to be no more than supervisory. Town of Dedham, 4 MLC 1347 (H.O. 1977). The rationale for the ruling was that inspectors in general "do not formulate or determine policy. Rather, they apply fixed inspection standards on a routine basis." Id. at 1349.

The Town claims the Shellfish Constable is managerial because he manages shellfisheries and may conduct studies when he considers them necessary. These reasons are far from sufficient to make the Constable a manager. It is true that he is involved in an area of expertise so specialized that his supervisors will often be guided to a great extent by his suggestions. Yet under Worcester School Committee, supra, that is inadequate to make him a manager even though his "suggestions may often form the basis, or part of the basis, upon which management decisions are ultimately made." Id. at 1673.

The Town would also like the Commission to consider the Park Foreman to be managerial because he has several persons under his control, recommends a budget and runs a large department. Again, these reasons are far from sufficient to warrant calling the Foreman a manager.⁹

⁷Gerald Houk is a Selectman for the Town of Wellfleet.

⁸No evidence was presented to suggest that the Selectmen could not overrule the Inspector.

⁹The Town stated that it was not given the opportunity to bring in witnesses and evidence regarding the position of Park Foreman because it was excluded from the petition. This complaint is unjustified for two reasons.

In the first place, the Park Foreman position was not excluded from the petition as such, even though it was not specifically named therein. In its petition the Union stated that it was seeking representation of all the employees of Wellfleet. It then provided lists of all those positions to be included and all those positions to be excluded. The Park Foreman position did not appear on either list.

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B. Confidential Status of Clerk

It is the Town's contention that the Clerk, Board of Selectmen is a confidential position because it is a full time position which involves working with the Board of Selectmen in Executive Sessions and on confidential labor relations matters. The hearing officer disagreed and rightly so.

This is not a full time position. It is filled only 2-1/2 days per week. Nickerson does not ordinarily sit in on Selectmen's meetings. She does so only when the Administrative Assistant is ill or on vacation. She has also never been involved in grievance meetings with the Board of Selectmen. As the hearing officer noted, the record is devoid of any evidence that Nickerson has actually been exposed to collective bargaining strategy or contract proposals. The only time the situation could even arise is when she replaces the Administrative Assistant. Thus, Nickerson only rarely, if ever, has access to confidential materials. The bulk of her time is spent on routine non-confidential clerical and accounting duties.

The Act requires more than sporadic access to confidential materials to exclude an employee. Stoneham School Committee, 3 MLC 1390 (H.O. 1977); Silver Lake Regional School Committee, 1 MLC 1240 (1975); Westinghouse Electric Corp. v. NLRB, 398 F.2d 669 (CA 6, 1968). Instead the employee must have a "continuing and substantial relationship with managerial employees involving a legitimate expectation of confidentiality in their routine and recurrent dealings." Town of Scituate, 7 MLC 1281, 1288 (1980), aff'd. in relevant part 7 MLC 2120 (1981).

"The Commission applies the confidential exclusion so as to preclude as few employees as possible from collective bargaining while at the same time not wishing to hamstring an employer in the operation of its business." Silver Lake Regional School Committee, 1 MLC 1240, 1243 (1975). The Town here offered no proof that including the Clerk in the unit would pose difficulties. Because the Clerk to the Board of Selectmen has access to confidential information so rarely, it would unjustly deny her the right to participate in collective bargaining to overrule the hearing officer and call her confidential.

C. Seasonal Status of Park Department Laborers

The hearing officer determined that she should consider whether all seasonal employees should be placed in the unit. She rejected the Union's argument that the two seasonal laborer positions in the Park Department sought by the Union had sufficient continuity of employment and community of interest with the non-supervisory bargaining unit.

The standard for determining the appropriateness of including seasonal employees in a bargaining unit with regular employees generally involves the employees' expectation of continuing employment. Town of Scituate, (H.O. Decision), 7 MLC 1281, 1289 (1980); aff'd. in part, 7 MLC 2120, 2122 (1980); City of Gloucester, 1 MLC 1170 (1970). We have stated that seasonal employees may effectively exercise collective bargaining rights in a bargaining unit of full-time personnel if there is a community of interest with the unit and there is a substantial stability in the seasonal work force year after year. City of Springfield, 5 MLC 1170, 1172 (1978).



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The evidence indicates that Edward Lynch, the individual holding one of the Park Department Laborer positions sought by the Union (which is also known as a Maintenance Engineer) is the only employee who holds a seasonal position that is funded for six months out of 12 and to which the incumbent has returned for three consecutive years. Based upon these facts, we determine that the position of Park Department Laborer held by Edward Lynch has a sufficient degree of stability to be included in the unit.

On the record before us, and pursuant to the same analysis, we cannot place the Park Department Laborer position filled by David Balch in the bargaining unit. It is true that the position is funded for longer than the summer months. The record does not show whether this position was funded for longer than the one year period. We know only that the Town created the position for one year. We do not know whether the incumbent, who held the position at the time of the hearing, returned or was recalled to the position for another year. Therefore there is insufficient evidence upon which to conclude that the position has a sufficient degree of stability to be included in the unit. Therefore, we affirm the hearing officer on the exclusion of the Park Department Laborer position.¹⁰

Conclusion

Based upon the above, we find that neither the Harbor Master, Building Inspector, Shellfish Constable nor the Park Foreman are managerial. Likewise, the Clerk to the Board of Selectmen is not confidential. Finally, the Park Department Laborer (Park Department Maintenance Engineer) is not a seasonal employee. All five positions should be included in the bargaining units as established by the hearing officer. Thus the decision of the hearing officer is thereby affirmed.

Direction of Election

On the basis of the foregoing, we conclude that a question has arisen concerning the representation of certain employees of the Town of Wellfleet. The following units are appropriate for the purpose of collective bargaining:

Unit A:

All full-time and regular part-time non-supervisory employees in the Town of Wellfleet including employees in the following positions: Laborer-Highway Department, Driver-Highway Department, Custodian, Assistant Harbor Master, Clerk-Board of Selectmen and Assessor's Clerk, Park Department Laborer (Park Department Maintenance Engineer), but excluding the Administrative Assistant to the Board of Selectmen and all supervisory, managerial, confidential, casual and all other employees.

¹⁰ The Union also contends that there should only be one bargaining unit. We have reviewed the hearing officer's rationale for establishing two bargaining units. We find no error in her conclusion establishing a supervisory bargaining unit and a non-supervisory unit.



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Unit B: -

All full-time and regular part-time supervisory and technical employees in the Town of Wellfleet including employees in the following positions: Harbor Master, Librarian, Building Inspector, Park Foreman and Shellfish Constable but excluding the Accountant, Highway Surveyor and all managerial, confidential, casual and all other employees.

IT IS HEREBY DIRECTED that an election shall be held for the purpose of determining whether a majority of the employees in the above-described units desire to be represented by the Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 59, a/w/ I.B. of T.C.W. & H. of America or by no employee organization.

Inasmuch as the above-described Bargaining Unit B includes the position of Librarian, found to be professional within the meaning of Section 1 and 3 of the Law, employees who hold that position shall be given a separate ballot which will offer them the choice of placement within the above-described Unit B or in a separate professional unit.

The eligible voters shall include all those persons within the above-described unit whose names appear on the payroll of the Employer on October 12, 1984, and who have not since quit or been discharged for cause.

In order to ensure that all eligible voters shall have the opportunity to be informed of the issues and their statutory right to vote, all parties to this election shall have access to a list of voters and their addresses which may be used to communicate with them.

Accordingly, IT IS HEREBY FURTHER DIRECTED that three (3) copies of an election eligibility list containing the names and addresses of all eligible voters must be filed by the Employer with the Executive Secretary of the Commission, Leverett Saltonstall Building, 100 Cambridge Street, Room 1604, Boston, Massachusetts 02202, not later than fourteen (14) days from the date of this decision.

The Executive Secretary shall make the list available to all the parties to the election. Failure to make timely submission of this list may result in substantial prejudice to the rights of the employees and the parties, no extension of time for the filing thereof will be granted except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting aside the election should proper and timely objections be filed.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION
PAUL T. EDGAR, CHAIRMAN
GARY D. ALTMAN, COMMISSIONER

9 (continued from p. 1242)

More importantly, the Town did offer evidence regarding the Park Foreman. During the hearing both the Town and the hearing officer asked the Town's one witness many questions about the position. Since no documentary evidence was offered in this case, there is a comparable amount of evidence regarding each position, including Park Foreman.

