

In the Matter of TOWN OF DARTMOUTH  
and  
MASS. LABORERS DISTRICT COUNCIL

Case No. MCR-02-4985

34.71 departmental unit  
35.7 supervisory and managerial employees  
93.3 petition for certification

May 7, 2003

Helen A. Moreschi, Chairwoman  
Peter G. Torkildsen, Commissioner

Joseph Hannon, Esq. Representing the Town of  
Dartmouth

Tony Pini Representing the Massachusetts  
Laborers District Council

**DECISION<sup>1</sup>**

STATEMENT OF THE CASE

On June 19, 2002, the Massachusetts Laborers District Council (Union) filed a petition with the Labor Relations Commission (Commission) pursuant to Section 4 of M.G.L. c. 150E (the Law) seeking to represent all supervisors and assistant supervisors employed at the Department of Public Works (DPW) in the Town of Dartmouth (Town).

On October 15 and 16, 2002, Diane M. Drapeau, a duly designated hearing officer of the Commission, conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. At the hearing the parties agreed that the titles of assistant water and sewer supervisor, assistant water pollution control manager, and assistant highway supervisor would be included in the bargaining unit. However, the Town sought to exclude the five remaining titles from the bargaining unit as managerial employees. The parties filed post-hearing briefs on December 2, 2002.

FINDINGS OF FACT

The Board of Public Works (Board) operates the Town's DPW. The Town's Selectmen appoint the three-member Board for three-year terms. The Board meets biweekly to make policy decisions, make appointments to the DPW, listen to citizens' complaints, and hear reports from the superintendent of the DPW, the chief financial officer, and department heads.

There is an existing bargaining unit for the DPW laborers represented by the Union. The executive administrator for the Town negotiates all of the Town's collective bargaining agreements, including the agreement for the DPW laborers. During the most

recent negotiations he sought input from all of the division heads, the assistant superintendent, and the superintendent of the DPW.

*Superintendent of DPW*

David Bernier (Bernier) is the superintendent of the DPW. The Board appointed him to the position of superintendent in November 2000 and Bernier signed an individual employment contract effective from November 7, 2000 through November 7, 2003. The contract describes his hours, compensation, and benefits.

Bernier is responsible for the day-to-day operations of the DPW. He reports directly to the Board. His job duties include: 1) planning, directing, and administering all aspects of the DPW; formulating, developing, and recommending departmental policies, projects, and procedures; implementing and administering policies and directives of the Board; 2) managing the construction and/or maintenance of roads, sidewalks, bridges, landfill, equipment, sewer, water and water systems; planning and scheduling public projects and providing information to the various local and state boards and commissions required; reviewing proposed highway construction, reconstruction and maintenance projects to the Board, the assistant superintendent and engineering staff and supervisors of the operating divisions; developing work schedules and prioritizing projects; 3) overseeing through subordinates the planning, design, and operation of water and sewer distribution systems, storm drainage systems, road construction and improvements, winter maintenance, equipment maintenance, and various special projects of a public works nature; overseeing through subordinates personnel engaged in the operation of the waste water and water treatment facilities; 4) ensuring that waste water and water treatment facilities and sites comply with applicable environmental regulations and standards; conferring with state and federal officials on matters of environmental concern; 5) overseeing the consulting engineers, the division supervisors and in-house engineering staff in the development of plans, priorities and timetables for all DPW projects; 6) managing the DPW's personnel and handling all labor relations, training, staffing, and evaluation of employees; overseeing management of departmental finances; administering all short and long term planning; maintaining departmental records and correspondence; 7) preparing the DPW budget; coordinating preparation of division budgets and short and long range capital expenditure programs; presenting annual budget to Board for approval; 8) overseeing the competitive bidding process to ensure compliance with applicable regulations; reviewing bid proposals and interviewing prospective contractors and consultants; monitoring and evaluating contractual services for compliance with specifications and applicable conditions; and 9) representing the DPW at a multitude of different meetings both internally and externally; handling all media questions on behalf of the department; and having frequent contact with county, state, and federal agencies to ensure compliance with all laws and regulations affecting the work of the department.

Bernier is also the DPW's representative at Step One of the grievance procedure for the collective bargaining agreement between the Town and the Union for the laborers employed by the DPW. With respect to bargaining, he has only sat in on one labor/management meeting with the Union's local shop stewards. Although he has the authority to discipline rank-and-file employees, he may only recommend disciplinary action for supervisors to the Board. He also makes recommendations to the Board about promotions. He does not have the authority to hire and fire employees, but he can make recommendations to the Board who approve his recommendations 99% of the time.

*Assistant Superintendent of DPW*

David Hickox (Hickox) has been the assistant superintendent of the DPW for fifteen years. The Board appointed him to the position of assistant superintendent. Hickox also has an individual employment contract effective from July 1, 2001 through June 30, 2003 covering his hours, compensation, and benefits. He reports to Superintendent Bernier.

His job duties include: 1) planning, inspecting and administering public works projects such as streets, culverts, drains, sidewalks, sewers, solid waste disposal, and water mains; responsibility for the planning, designing and engineering preparation of projects; preparing contract specifications and handling the bidding process; handling numerous projects ranging from parking lot design to bridge rehabilitation to building demolition; overseeing the work of all project consultants; 2) acting as the professional engineer<sup>2</sup> for the Town; reviewing and approving subdivision plans, commercial projects, public utilities (water, sewer, drainage, roadway design); meeting with engineers and developers to review construction requirements and specifications; reviewing all plans submitted to the Planning Board, Board of Appeals, Conservation Commission, and upon request, Building Department, Board of Health, Police Department and Board of Selectmen; 3) overseeing the engineering department and engineering staff; assigning and reviewing staff work; calculating cost estimates of projects; reviewing and approving materials used in public works projects within the Town; 4) working with the superintendent of the DPW preparing state and federal grants for municipal projects; responsibility for processing payments, reimbursements, and closeout of grants; 5) coordinating work assignments with the various DPW divisions; in the absence of the superintendent, directing the supervision of employees in all divisions of the DPW; 6) responding to routine and professional technical inquiries over the telephone and in person relative to all aspects of DPW operations; and resolving all citizen requests.

Hickox is also involved in the conflict resolution process for the contractual grievance procedure for the rank-and-file employees of the DPW. Sometimes the Board asks him to stay for the grievance hearing. In his fifteen years with the Town, he has only seen two or three grievances. He does not take part in collective bargaining. Occasionally he sits in on the Board's executive sessions.

2. The parties agreed that Hickox is a professional employee because he is the civil engineer for the Town.

In the absence of the superintendent, Hickox is the acting superintendent. If he receives a grievance during this period of time, he contacts the chairman of the Board about it and tables the grievance until the superintendent returns. He meets with the superintendent daily. He also has the authority to issue verbal and written reprimands.

*Highway Supervisor*

Christopher Okafor (Okafor) is the highway supervisor. The Board appointed him to the position of highway supervisor. Okafor also has an individual employment contract effective from April 3, 2002 to June 30, 2003. He reports directly to Superintendent Bernier.

Okafor's job duties include: 1) supervising the construction, repair and maintenance of streets, walks, parking areas and similar projects; coordinating construction equipment, and the work of tradesmen and laborers; 2) planning the use of manpower and equipment and carrying through the execution of projects and programs assigned to him by the superintendent; 3) providing coordination and supervision over employees in the field, instructing personnel as to procedures to be followed in connection with specific task assignments; possibly personally operating the more difficult equipment, as well as performing any of the duties of subordinates; 4) processing daily work orders received from the superintendent; follows up on resulting assignments for compliance with instructions; approves time reports covering men and equipment; keeps operating records and prepares reports; 5) coordinating and providing supervision of field operations during snow plowing and removal, and during other emergency activities; 6) responding to citizen requests and investigating and resolving problems as needed; attending meetings of the Board and other board/committee meetings as required; 7) reviewing and approving bills for parts and materials used for the highway division; 8) during the winter, supervising the operation of snow removal and road sanding on a 24-hours basis; 9) overseeing the DPW garage and ensuring equipment maintenance as needed; oversees yard operations and composting process; and 9) informing the police department, utility companies, and other DPW divisions of a scheduled construction or reconstruction project with particular emphasis on essential coordination of services for construction. In addition, he has the authority to issue verbal and written reprimands.

*Water and Sewer Supervisor*

Steven Sullivan (Sullivan) is the water and sewer supervisor. The Board appointed him to the position of water and sewer supervisor. Sullivan also has an individual employment contract effective from April 26, 2001 through April 25, 2004 describing his work hours, compensation, and benefits. He reports to Superintendent Bernier.

His job duties include: 1) planning and laying out the construction, maintenance and operational work of the water and sewer division; conferring with the superintendent on major problems and recommending solutions; 2) assuring an adequate supply of potable water to residential and commercial users and sufficient supply at proper pressures for fire fighting and for industrial uses; 3) in-

specting work for compliance with standards or instructions or for contract compliance; making necessary progress reports and final project reports; advising contractors; 4) supervising maintenance of pumps, both water and sewer, at booster and other stations; supervising treatment, storage and pumping of water; 5) preparing budgets and reports; supervising record-keeping; estimating costs of water and water and sewer services to homes and industrial plants.

Sullivan has sat in on grievance hearings as a witness to an incident. He makes recommendations regarding the grievance to the superintendent. He has never been involved in negotiations. He has the authority to issue verbal and written reprimands.

*Water Pollution Control Manager*

Carlos Cardoso (Cardoso) is the water pollution control manager. The Board appointed him to the position of water pollution control manager. Cardoso has an individual employment contract with the Town that sets forth his salary, work hours, and benefits from July 1, 2001 through June 30, 2004. He reports to Superintendent Bernier.

His job duties include: 1) analyzing and evaluating operation, laboratory, and maintenance functions and records for the waste water treatment plant; applying appropriate corrective measures to mitigate potential problems and restoring proper operating standards and methods to mechanical and biological processes; 2) preparing and coordinating operating budgets, capital requests; reviewing and submitting all purchasing requests, operating reports, and financial data; controlling expenditures; preparing specifications for purchasing; monitoring issues surrounding union matters; 3) supervising, instructing, and training personnel in operations and maintaining safety; 4) conducting plant inspections to determine efficiency, safety, and cleanliness; determining appropriate remedial actions in both emergency and non-emergency situations; 5) monitoring the operation of plant equipment through computer systems, making necessary adjustments either by computer or through employee directives; 6) in the absence of the assistant plant supervisor, performing all necessary laboratory testing; 7) meeting with the Board on matters concerning the water pollution division; supplying the Board with information they may need to make decisions pertaining to the water pollution division; 8) reviewing permits as they are received from EPA and DEP to ascertain if changes can be requested which would result in lower operating costs for the Town.

Cardoso is not involved in negotiations. Although he may occasionally be present at a Board executive session, he generally has not been involved in resolving grievances. When hiring the assistant water pollution control manager, Cardoso was present at the interview and the superintendent asked his opinion of the candidates. He has the authority to issue verbal and written reprimands.

OPINION

*Managerial Status of Employees*

The Town contends that the positions of superintendent, assistant superintendent, highway supervisor, water and sewer supervisor,

and water pollution control manager should be excluded from the proposed bargaining unit because they are managerial employees.

Section 1 of the Law provides:

Employees shall be designated as managerial employees only if they (1) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or the conduct or collective bargaining on behalf of a public employer, or (c) have substantial responsibility involving the exercise of independent judgement of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration

An employee must be excluded from an appropriate bargaining unit if the person's actual duties and responsibilities satisfy any one of the three statutory criteria. *Town of Manchester-by-the-Sea*, 24 MLC 76, 81 (1998). To be considered a managerial employee, the scope of the employee's discretion in formulating policy must be significant in relation to the mission of the public entity or the employee's decisions must have an impact on a significant aspect of the public entity. *City of Amesbury*, 25 MLC 7, 9 (1998); *Town of Manchester-by-the-Sea* at 81; *Higher Education Coordinating Council*, 23 MLC 194, 197 (1997). To participate to a substantial degree in formulating policy includes not only the authority to select and implement a policy alternative but also regularly participating in the policy decision-making process. *City of Amesbury* at 9; *Town of Plainville*, 18 MLC 1001, 1009 (1991); *Town of Agawam*, 13 MLC 1363, 1368 (1986). Thus, it does not include employees who merely provide some input necessary for the development of policy, but who do not otherwise participate meaningfully in the decision-making process. *City of Amesbury* at 9; *Higher Education Coordinating Council* at 197; *Town of Wellfleet*, 11 MLC 1238, 1241 (1984). Merely consulting in formulating policy or periodic discussions with higher administrators on policy matters is not enough to make one a managerial employee. *City of Amesbury* at 9; *Higher Education Coordinating Council* at 197; *City of Quincy*, 13 MLC 1436, 1440 (1987).

Under the second part of the statutory definition, a person must participate to a substantial degree in preparing for or conducting collective bargaining. Identifying problem areas to be discussed during bargaining, or merely consulting about bargaining proposals is insufficient to satisfy this second criterion. Rather, the employee must either participate in actual negotiations, or be otherwise involved directly in the collective bargaining process by preparing bargaining proposals, determining bargaining objectives or strategy, or having a voice in the terms of settlement. *Town of Manchester-by-the-Sea* at 81, citing *Town of Medway*, 22 MLC 1261, 1269 (1995).

Under the third criterion, the Commission has determined that the words "independent judgment" require that the employee exercise discretion without consultation or approval. *Town of Manchester-by-the-Sea* at 81, citing *Wellesley School Committee*, 1 MLC 1399, 1408 (1975). A coincidence of recommending and acceptance by a higher authority is insufficient. *Id.* To be "substantial," the responsibility must not be perfunctory or routine, it must have some impact and significance. *Id.* Finally, the appellate authority must be exercised beyond the first step in a grievance-arbitration

procedure. *Id.* The exercise of supervisory authority to insure compliance with the provisions of a collective bargaining agreement is insufficient, standing alone, to satisfy this third criterion. *Town of Manchester-by-the-Sea* at 81, citing *Town of Agawam* at 1369.

Based on the record, we conclude that the only position that should be considered managerial is the superintendent of the DPW. His job duties satisfy both the first and third criteria of the definition of managerial employee. He reports directly to the Board and meets regularly with them to participate in policy-making decisions. He plans, directs, and administers all aspects of the DPW; he formulates, develops, and recommends departmental policies, projects, and procedures, and implements and administers policies and directives of the Board. In addition, he exercises independent judgment on a daily basis because he is the only person responsible for the day-to-day operations of the DPW. Although the Town's executive administrator sought Bernier's input during recent negotiations, his minor role in negotiations and his involvement at Step One of the grievance-arbitration procedure are insufficient to satisfy the second criteria. However, his duties need only satisfy one of the criteria to be considered managerial. Furthermore, in other cases where the superintendent or director of public works had similar duties, the Commission has excluded that position as managerial. See *e.g.*, *City of Amesbury* at 9; *Town of Agawam* at 1369.

The assistant superintendent is not a managerial employee because he does not participate to a substantial degree in formulating policy. Rather, Hickox primarily functions as the Town's engineer, and with the exception of acting as the superintendent in Bernier's absence, he does not exercise the level of responsibility and independent judgment that the superintendent does on a daily basis. Furthermore, his role in the collective bargaining process is minimal as is his grievance role.

In addition, all of the three remaining positions report directly to the superintendent and primarily operate as department heads whose duties are supervisory. None of them have a significant role in collective bargaining — at most, the Town's executive administrator consults them when he prepares for collective bargaining. Nor do they have a significant role in the grievance-arbitration process. Only the superintendent has a role at Step One of that process.

#### *Confidential Status of Employees*

Section 1 of Chapter 150E defines a "confidential" employee as follows:

Employees shall be designated as confidential employees only if they directly assist and act in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter.

The Commission has construed this statutory language to exclude those persons who have a direct and substantial relationship with an excluded employee that creates a legitimate expectation of confidentiality in their routine and recurrent dealings. *Fall River School Committee*, 27 MLC 37, 39 (2000); *City of Lawrence*, 25 MLC 167, 168 (1999); *Town of Medway*, 22 MLC 1261, 1269 (1995). Employees who have significant access or exposure to confidential information concerning labor relations matters, man-

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agement's position on personnel matters, or advance knowledge of the employer's collective bargaining proposals are excluded as confidential. *City of Everett*, 27 MLC 147,150 (2001); *Fall River School Committee*, 27 MLC at 39, citing *Framingham Public Schools*, 17 MLC 1233 (1990). None of the disputed positions here satisfy the Commission's test for determining the confidential status of employees. Although they may have been asked for their input prior to and during negotiations, it is the Town's executive administrator who negotiates on behalf of the Town.

*Appropriateness of the Proposed Bargaining Unit*

We must next decide whether a bargaining unit composed of supervisory positions at the DPW constitutes an appropriate bargaining unit. Bargaining units limited to departments or other administrative divisions are too narrow to be appropriate if there exists a community of interest among a larger group of employees sufficient to create a broad, comprehensive bargaining unit. *Lower Pioneer Valley Educational Collaborative*, 28 MLC 147 (2001), citing *City of Springfield*, 24 MLC 50, 54 (1998). Here, the Union seeks a bargaining unit composed of DPW supervisory employees. Although the record does not reflect the titles of the other supervisory positions in the Town, in cases where the Commission has considered Town-wide supervisory units, the positions usually include heads of departments, such as town accountant, town treasurer, town assessor, town planner, director of the council on aging, director of parks and recreation, highway superintendent, water/sewer superintendent. See, e.g., *City of Amesbury* at 9-10; *Town of Plainville*, 18 MLC 1001, 1013-1014 (1991); *Town of Agawam* at 1369. Based on Commission precedent, the petitioned-for bargaining unit is underinclusive because it seeks only the supervisors in one department and does not include other Town department heads and supervisory employees. Therefore, we conclude that the proposed bargaining unit of DPW supervisors is not an appropriate bargaining unit. Accordingly, we dismiss the Union's petition.<sup>3</sup>

SO ORDERED.

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3. The Town also argued that the employees' individual employment contracts should act as a bar to the processing of the petition until the expiration of those contracts. Because we are dismissing the petition, we need not address this issue.