

In the Matter of TOWN OF GREENFIELD  
and  
SALARY SCHEDULE EMPLOYEES ASSOCIATION

Case Nos. MUP-04-4178 and CAS-04-3588

- 31. *Jurisdiction*
- 32. *Binding Effect of Unit Determination*
- 34.2 *community of interest*
- 35.2 *confidential employees*
- 35.3 *inclusion of professionals and craft severance*
- 35.7 *supervisory and managerial employees*
- 35.91 *legislative employees*
- 36. *One Person Units*
- 67.15 *union waiver of bargaining rights*
- 67.19 *conflicting ordinances or by-laws*
- 67.42 *reneging on prior agreements*
- 67.66 *altering bargaining unit*

February 8, 2006

*Allan W. Drachman, Chairman*  
*Hugh L. Reilly, Commissioner*

*Richard D. Hayes, Esq.*      *Representing the Town of  
Greenfield*

*William C. Newman, Esq.*      *Representing the Salary Schedule  
Employees Association*

## DECISION<sup>1</sup>

### Statement of the Case

On June 28, 2004, the Salary Schedule Employees Association (Union or SSEA) filed a charge of prohibited practice with the Labor Relations Commission (Commission) alleging that the Town of Greenfield (Town) had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c.150E (the Law) by withdrawing recognition from approximately twenty bargaining unit positions during the term of the parties' collective bargaining agreement.

On July 19, 2004, the Union filed a complaint in Franklin Superior Court seeking, among other things, a preliminary injunction against the Town from unilaterally withdrawing recognition from certain positions listed in the parties' collective bargaining agreement. On July 26, 2004, the Court granted the Union's request for a preliminary injunction. The Court's Order states in pertinent part:

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.
2. The Commission denied the Town's motion to dismiss without prejudice.
3. The Commission's complaint inadvertently omitted the paragraph alleging that the Town had violated Section 10(a)(5) of the Law by the acts alleged in paragraphs 11 and 12 of the complaint. However, in its ruling denying the parties' cross-motions to dismiss these matters, which issued the same day as the complaint, the

It is hereby ORDERED that the Town of Greenfield be preliminarily enjoined from unilateral withdrawal of recognition of the Salary Schedule Employees Association as the representative of positions previously recognized under the Collective Bargaining Agreement entered into between the parties on July 1, 2001, until the matter can be determined before the Massachusetts Labor Relations Commission.

On July 29, 2004, the Town filed a clarification and amendment petition with the Commission seeking to exclude twenty-seven positions from the Union's bargaining unit on grounds that they fall within one or more of the following categories: department head, legislative employee, confidential employee, managerial employee, or professional employee not given a separate vote. The Commission docketed that petition as CAS-04-3588.

On August 20, 2004, the Town filed a motion to dismiss Case No. MUP-04-4178 or, alternatively, to consolidate that charge for hearing with Case No. CAS-04-3588. On August 23, 2004, the Union filed a motion to dismiss the CAS petition on the grounds of contract bar, and because the Town had not asserted any "legally cognizable basis for a unit clarification petition." On September 21, 2004, the Commission denied both parties' motions to dismiss,<sup>2</sup> consolidated the cases for hearing, and issued a complaint in Case No. MUP-04-4178.<sup>3</sup>

The Town filed an answer to the complaint on September 27, 2004 and an amended answer on September 29, 2004. On October 6, October 7, October 8 and November 12, 2004, Marjorie F. Wittner, Esq., a duly-designated Commission hearing officer (Hearing Officer), conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. Following the hearing, the Town and the Union respectively filed post-hearing briefs on December 24, 2004 and December 28, 2004. On March 18, 2005, the Hearing Officer issued her recommended findings of fact. The Union and the Town respectively filed challenges to the recommended findings of fact on April 1, 2005 and April 4, 2005.

### Findings of Fact<sup>4</sup>

Both parties challenged portions of the Hearing Officer's recommended findings of fact. After reviewing those challenges and the record, we adopt the Hearing Officer's recommended findings of fact, as modified where noted, and summarize the relevant portions below.

### Bargaining History

The Town's pay classification plan categorizes the Town's employees as follows: F - All uniformed Fire Department personnel;

Commission notified the parties that it had found probable cause to believe that the Town had violated Section 10(a)(5) of the Law. Moreover, it is evident from the record, including the parties' post-hearing briefs, that both parties had the opportunity to, and did, fully litigate the Section 10(a)(5) allegation. Accordingly, we find that no party has been prejudiced by this inadvertent omission, and we amend the pleadings accordingly. 456 CMR 15.05(2).

4. As discussed in more detail below, the Town contests the Commission's jurisdiction over Case No. MUP-04-4178.

P - all uniformed Police Department personnel; C - clerical personnel; W - Department of Public Works (DPW) personnel; S - salaried personnel (S schedule employees). In 1992, the S schedule included salaried as well as hourly employees and was intended to include all employees of the Town not otherwise covered by a labor agreement or by an individual employment agreement.<sup>5</sup>

In November of 1992, a number of S schedule employees decided to form their own bargaining unit (the S unit). They did not file a representation petition with the Commission. The sole criterion for membership in the bargaining unit was whether the employees were classified as S schedule employees.<sup>6</sup>

In or around November of 1992, the S schedule employees held a secret ballot election to decide whether to form a union. They voted 22-17 in favor of forming a union. The S schedule employees notified Town Manager Norman Thidemann (Thidemann) about the election results. On November 19, 1992, Thidemann wrote a memo to the Town's Board of Selectmen stating:

The nonunion employees have voted to form an employee bargaining group (union). Twenty-two out of the 39 eligible employees voted to form the organization; and while I have the right to order the Labor Relations Commission to conduct an election I have chosen not to. This unit will cover all nonunion town employees except myself.

On November 25, 1992, the Town posted the following notice:

Pursuant to Massachusetts Labor Commission Rule 14.06(2), notice is hereby given that the "S" Schedule Town Employees have voted to form an Independent Association to serve as their bargaining unit. It is my intent, as per the above Rule, to recognize such unit.

Thidemann's signature appears at the bottom of that notice.

Human Resources Director Dennis Helmus (Helmus), the Union's first secretary and one of its founders, and Michael Franchesi (Franchesi), then Union president and Library Director, drafted the SSEA's first collective bargaining agreement, which was executed and signed by both parties.<sup>7</sup>

The parties have negotiated four collective bargaining agreements since 1992, the most recent of which is effective by its terms from July 1, 2001 - June 30, 2004 (Agreement).

Article 3 of the Agreement, titled "Recognition and Rights," states:

In accordance with the recognition of the Association by the Town pursuant to Rule 14.06(2) of the Massachusetts Labor Commission on November 19, 1992, the Town recognizes the Association as the sole and exclusive representative of all S-schedule employees who come within the bargaining unit described herein and as enumerated in "List of SSEA Positions Covered by Contract" as Memorandum of Understanding #1 to this Agreement.<sup>[8]</sup>

...

C. The Town shall notify the Association of any new positions or classifications which arguably should be added to the bargaining unit. The Town further agrees to meet and negotiate with the Association solely regarding such new positions or classifications, and of the step and grade of the new position. Likewise, the Town shall notify and negotiate with the Association of any change of step, grade or classification of any current positions.

Article 33, titled "Continuation of Administrative Personnel," states:

Any person holding an office or position in the administrative service of the town who is a member of the SSEA shall retain such office or position and shall continue to perform his/her duties until provisions have been made in accordance with any future adopted or amended Home Rule Charter for the performance of the said duties by another person or agency. . . . All such persons shall be retained in a capacity as similar to their former capacity as it is practical to do so.

Article 35, the duration clause of the Agreement, states:

A. This contract shall be in full force and effect between the dates of July 1, 2001 and midnight June 30, 2004, and thereafter shall automatically renew itself for successive terms of one (1) year until the negotiation of a new contract has been executed.

During the term hereof, this Agreement may not be modified or amended except by the mutual written addendum of the parties.

...

C. If any portion(s) of this Agreement shall be found to be invalid by law, rule, appropriation or regulation, then said portion shall be amended so as to conform to same. The remaining portion(s) of this Agreement shall continue in full force and effect.

Article 36(d) of the Agreement states:

The Town and the Association agree that, if, during the term of this Agreement there is enacted any mandatory statute of the Commonwealth of Massachusetts which alters the terms and conditions of employment as established by this Agreement, such statute shall be in force and effect insofar as this Agreement is concerned whenever

5. The Hearing Officer took administrative notice of the following certifications of representative issued by the Commission after conducting a secret ballot election: Case No. MCR-2460, *Town of Greenfield and United Electrical, Radio & Machine Workers of America, U.E. Local 274*, issued December 17, 1976; Case No. MCR-2490, *Town of Greenfield and Greenfield Permanent Firefighters, Local 2548, International Association of Firefighters*, issued July 27, 1978 (firefighters); Case No. MCR-3949, *Town of Greenfield and Teamsters, Local 404*, issued January 29, 1990 (civilian police dispatchers).

6. In fiscal year 1992, there were thirty-four (34) S schedule titles in the Town's classification plan.

7. Helmus did not become the Town's Human Resources Director until 1999. He held a number of different Town positions before then, including Assistant Clerk to Town Council, Assistant Registrar of Voters and Assistant Supervisor of Elections. Helmus also served as Union president from 1996 to 1998. Mayor Christine Forgey (Mayor Forgey), then Town Assistant Accountant, was the Union's first vice president.

8. The Memorandum of Understanding (MOU) attached to the parties' most recent agreement is dated September 25, 2001. It lists 50 positions and the names of the incumbent in each title. Three positions are listed as vacant: P/T Teen Center Coordinator, DPW Highway Foreman, and COA Outreach Coordinator. The titles of Assistant Collector and Treasurer/Collector are listed as "temporary under reorg." A list of these titles is attached hereto as Appendix 1.

said statute becomes effective. If there is an impact because of such legislation, the Town agrees to bargain the impact.

Since the S unit was recognized, a number of positions have been added and removed from the bargaining unit by mutual consent of the parties. For example, in or around 1996, when Helmus was Union president, a custodian was transferred from the S unit into the W unit, and a Council on Aging receptionist was transferred into the C unit. The parties agreed to remove the Retirement Analyst from the S unit, because it was determined that she was not a Town employee. In addition, after Helmus began serving as Human Resources Director in or around 1999, he unilaterally decided that he should no longer be a Union member, although he continued to pay an agency service fee for some period of time thereafter.

*Town of Greenfield Home Rule Charter*

In 2002, the citizens of Greenfield, which has a population of approximately 18,000 people, voted to approve a new Town charter. The charter, which was titled the “Town of Greenfield Home Rule Charter” (Charter), went into effect on July 1, 2003. Under the Charter, the Town adopted a city form of government with a strong Mayor, who is elected for a term of three years.<sup>9</sup>

The Town’s executive branch previously had consisted of five elected selectmen. The Charter also reduced the number of Town Council members, who serve three-year terms, from 27 to 13 members.

Section 3-2 of the Charter, titled “Executive Powers; Enforcement of Bylaws,” states in part:

(a) The executive powers of the Town shall be vested solely in the Mayor, and may be exercised by the Mayor either personally or through the several Town agencies under the general supervision and control of the office of the Mayor. The Mayor shall cause the Charter, the laws, the bylaws and other orders for the government of the Town to be enforced . . . .

(b) The Mayor shall exercise a general supervision and direction over all Town agencies, unless otherwise provided by the Charter or bylaw.

...

(d) The Mayor shall supervise, direct, and be responsible for the efficient administration of all Town activities and functions placed under the control of the Mayor by general law, by this Charter, by bylaw or otherwise. The Mayor shall be responsible for the efficient and effective coordination of the activities of all agencies of the Town of Greenfield and for this purpose shall have the authority to call together for consultation, conference and discussion at all reasonable times all persons serving the Town, whether elected directly by the voters, chosen by persons elected directly by the voters, or otherwise.<sup>10</sup>

...

Section 3-4 of the Charter, titled “Removal or Suspension of Certain Officials,” states:

(a) *Town Officers and Department Heads* - The Mayor may, in writing, remove or suspend any Town officer, or the head of any Town department appointed by the Mayor, by filing a written statement, with the Town Clerk, setting forth in precise detail the specific reasons for such removal or suspension. . . . The said Town officer, or head of a department, may make a written reply by filing such a reply statement, with the Town Clerk, within ten (10) days following the date the statement of the Mayor has been filed; but, such reply shall have no effect upon the removal or suspension unless the Mayor shall so determine. The decision of the Mayor in suspending or removing a Town officer or a department head shall be final, it being the intention of this provision to vest all authority and to fix all responsibility for such suspension or removal solely in the Mayor. The removal shall take effect on the 30th day following the date of filing by the Mayor of the notice of removal in the office of the Town Clerk.

(b) *Other Town Employees* - Unless some other procedure is specified in a collective bargaining agreement or by the provisions of the Civil Service Law, a department head may suspend or remove any assistant, subordinate or other employee of the agency for which such person is responsible in accordance with the procedures established for suspension and removal in the Personnel Bylaw. The decision of the department head to suspend or remove any assistant, subordinate or other employee shall be subject to review by the Mayor. A person from whom a department head has determined a suspension or removal is appropriate may seek review of such determination by the Mayor by filing a petition for review in the office of the Mayor. . . . The decision of the Mayor shall be final, it being the intention of this provision to vest all authority and to fix all responsibility for such suspension or removal solely in the Mayor. Nothing in this section shall be construed to be a bar to any other review as may be provided by general law.

Section 9-4 of the Charter, titled “Effect on Obligations, Taxes, Etc.,” states:

All . . . contracts and other instruments entered into or executed by or to the Town before the adoption of this Charter . . . shall be enforced . . . and . . . shall continue without abatement and remain unaffected by the Charter; and no legal act done by or in favor of the Town shall be rendered invalid by reason of the adoption of this Charter.

Mayor Forgey was elected as the Town’s first mayor on June 10, 2003.

*Withdrawal of Recognition*

On February 2, 2004, Mayor Forgey sent a memo to Union President Daniel LaRoche (LaRoche) regarding “SSEA Position Representation and Withdrawal of Recognition.” The memo states in pertinent part:

Be advised that pursuant to M.G.L. c. 150E, Section 1, *certain position are excluded from union bargaining units, which in general include: department heads/directors; agency heads/directors, administrative officers of departments/agencies; other managerial employees, and confidential employees.* [Italics in original.]

Therefore, this serves as notice (based on those principles and case law as developed under them) that in addition to the Executive Secretary to the Mayor position(s), the Town of Greenfield will no longer

9. The Charter refers to the Town as “the City of Greenfield known as the Town of Greenfield.” For ease of reference, the Commission will refer to the Respondent/Petitioner as the Town of Greenfield or “the Town.”

10. These excerpts from Section 3-2 of the Charter were added in response to a challenge by the Town.

ger recognize the following positions as being included in the bargaining unit by membership or agency fee as of March 1, 2004. This also serves as notice that we may consider additional positions as being not covered and will so notify you upon our determination.

- DPW Superintendent, Field Supervisor, Operations Supervisor;
- DPW Water Facilities Superintendent;
- HR Director and HR Administrative Assistant;
- Library Director;
- Collector/Treasurer;
- Director of Finance and Administration;
- Chief Assessor;
- COA Director;
- Health Director;
- Building Inspector;
- Police Management Assistant;
- Confidential Secretary to the Fire Chief;
- MIS personnel who hold administrative access to all data;
- Planning and Community Development Director;
- Accountant and Assistant Accountant.

The Town will honor the SSEA economic and fringe benefits as provided in the SSEA agreement until the individual contracts or applicable personnel policies are put in their place.

If you would like to meet to discuss this prior to our implementing it you may contact my office to do so and schedule an appointment.

The Union decided to set up a meeting, and on February 9, 2004, LaRoche, Union Vice President Kathleen Buntin (Buntin), and Union Secretary/Treasurer Nancy Goff (Goff) met with Mayor Forgey and Helmus to discuss the memo. The Union asked the Town for clarification and legal precedent as to why it considered the positions listed in the Mayor's February 2nd memo to be managerial. The Town replied that the Charter and Chapter 150E required it to exclude certain positions from the bargaining unit. The Town provided nothing further to the Union in support of its position. The Union then asked which positions the Town thought were "less strong," if the parties were to talk "hypothetically" about which positions should be removed from the unit. The Town replied that it could make a case "for or against" the DPW Operations Supervisors. The Union hypothesized that the Human Resources Director and the Finance Director would not be in the bargaining unit.<sup>11</sup> The parties next discussed the issue of successor contract negotiations, and the Union indicated that it was not prepared to start negotiations due to the outstanding unit issues.

On February 13, 2004, LaRoche sent a memorandum to Mayor Forgey, which states in pertinent part:

This memo serves to respectfully request that you comply with SSEA contract Article 3(c) and . . . negotiate with the Association on any change of step, grade or classification of any current positions. Also in the [February 9, 2004] meeting you implied that M.G.L. c. 150E, Section 1 applies because of changes in the Town's

Charter. We request you comply with SSEA contract Article 36(d) that states in part that if there is any mandatory statute of the Commonwealth that alters the conditions of employment as established by the SSEA agreement, the Town would agree to negotiate any impact of such change. Removing 17 members from the SSEA will have a great impact on our ability to negotiate a favorable contract.

We intend to consult with our own counsel to clarify our understanding of M.G.L. c. 150E, Section 1, and how the new Charter affects the SSEA. We are unclear and question how the positions you seek to remove fit the criteria of "managerial employees."

. . .

The SSEA assures you we intend to carry on the tradition of negotiating in good faith when our current contract expires at the end of June. Unless our counsel advises us differently, we believe that the Town must honor the current SSEA contract in its entirety.

On February 20, 2004, Helmus responded to LaRoche's February 13th memo as follows:

I have received the copy of your notice to the Mayor regarding the unit's position on the town's notice of withdrawal of recognition of certain unit positions. At the conclusion of that discussion, I agree that we did not come to a meeting of the minds on this issue. As indicated the reasons you advanced were not sufficient for the town to withdraw or amend its analysis of the matter at that juncture.

On February 17th, department heads and certain other unit members were invited and in attendance at the staff meeting with the Mayor. In those discussions, I also generally outlined the rationale under the charter and/or 150E from the town's point of view. The questions, comments or rationales discussed likewise did not alleviate the reasons why the town considers these positions to be excluded.

. . .

We respect your right to consult with your own counsel regarding our notice and expect we shall be meeting again regarding this issue. You may contact me to arrange a meeting at that time.

On February 29, 2004, LaRoche met with the Mayor to see whether she intended to go forward with her plan to withdraw recognition from the positions listed in her February 2, 2004 letter. At that meeting, LaRoche told Mayor Forgey that if she did proceed with her plan, the Union would file a prohibited practice charge with the Commission. Mayor Forgey informed LaRoche that she was not going to withdraw recognition from those titles on March 1st.

On March 18, 2004, Mayor Forgey sent a memo to LaRoche, which states in pertinent part:

Pursuant to our meeting and conversation of the [sic] February 9, 2004, this confirms that I have delayed the implementation of my intent to exclude certain positions from the S bargaining unit on 3/1/04 as per my memorandum of 2/2/04. As I indicated, I shall consider those named positions as ceasing being covered by the S contract as of 12:01 a.m., July 1, 2004. Of course, the exception remains the Town Clerk who continues to be excluded pursuant to Human Resource Director Helmus' memorandum of 7/31/03<sup>12</sup> to you, as

11. This finding, which is supported by the record evidence, has been added at the Town's request.

12. Neither party offered this memo into evidence during the course of the hearing.

under the law, that position is not entitled to collective bargaining rights as a legislative employee.

As I also indicated in the original notice, we may consider additional positions as being not covered and would so notify you upon our determination. In that regard, I am adding the Department Head position of Recreation Director to the list of non-covered positions as of July 1st as well.

As previously, the Town will honor the SSEA economic fringe benefits as provided in the SSEA agreement subsequent to 6/30/04 until either individual contracts or applicable personnel policies are put in their place.

On April 1, 2004, Union counsel William Newman (Newman) wrote to Mayor Forgey to inform her that he would be representing the Union during the upcoming contract negotiations and to respond to her March 18, 2004 memo to LaRoche. Newman's letter paraphrases the Mayor's previous correspondence to LaRoche and states, "Perhaps you have overlooked Article III of the [Agreement]. . . ." The letter further states, in pertinent part:

On behalf of the SSEA and all of the Union members, I hereby request that the Town of Greenfield contact me as soon as possible to begin negotiations with regard to the [Agreement] which is to expire on June 30, 2004.

I would ask you to respond not *later* than April 8, 2004 to confirm that my understanding of your memorandum is correct. If it is correct, the Town is refusing to bargain in good faith with the exclusive representative of these employees as recognized and required pursuant to G.L. c. 150E, §6. Unless the SSEA receives from the Town of Greenfield a revocation of this threat to refuse to bargain in good faith in regard to these employees, we will be forced to take appropriate action. If you could apprise me of the Town's position prior to April 8, that would be appreciated. [Emphasis in original.]

The Town replied to the Union's letter on April 5, 2004, stating, in pertinent part:

As you are aware, the Town is prepared to begin negotiations with the SSEA in regard to the [Agreement] which is set to expire on June 30, 2004 . . . .

Your letter also addresses issues concerning individuals whose participation in the SSEA is questionable, and whose positions are considered by the new Town administration as properly excludable from any bargaining unit. It is our hope that we can reach an amicable agreement on this issue; but if we are unable to do so we are prepared to have the issues submitted to the [Commission] or other mutually agreed arbiter.

Based on the April 5th letter, the Union believed that if the parties were unable to reach an amicable agreement about the Town's refusal to recognize certain S unit positions on or before July 1, 2004, the Town would go before the Commission or another mutually agreed arbiter for unit clarification.

On May 13, 2004, the parties held a preliminary negotiating session, which was attended by Town Counsel Richard Hayes (Hayes), Newman, LaRoche, Helmus and three members of the Union's negotiating committee. The Town submitted some preliminary ground rules, including a proposal that the parties limit the length of their negotiating sessions to two hours.<sup>13</sup>

Helmus spoke in some detail about the Town's budget. Neither party submitted substantive bargaining proposals at this meeting, nor was the issue of unit composition discussed. The parties scheduled two additional negotiating sessions for June 2nd and June 9, 2004.

At the June 2nd meeting, the parties discussed some additional budget matters, including health insurance and state aid. There was also discussion of entering into a one-year contract extension instead of exchanging a lengthy "laundry list" of proposals and negotiating a successor agreement. The Union was aware that the Town had provided a detailed set of proposals to other unions and indicated, in light of the Town's current economic situation, it would prefer to enter into a one-year extension of the agreement as opposed to engaging in lengthy negotiations for a successor agreement.<sup>14</sup> Based on the Union's stated preference to negotiate an extension to the Agreement, the Town did not provide the Union with a list of its proposals, although it had been prepared to do so.<sup>15</sup> There was little or no discussion of unit composition at the June 2nd meeting.<sup>16</sup> The parties agreed to discuss the contract extension issue the next time that they met.

At the June 9th meeting, the Town informed the Union that it intended to implement its plan to cease recognizing certain bargaining unit positions as of July 1, 2004. The Town stated its belief that it did not have to bargain over this matter because it was covered by statute, but that it was nevertheless open to discussing the issue. The Town provided the Union with a marked-up copy of Chapter 150E in support of its position. The Union replied that it had a duty to represent the entire membership at bargaining sessions, and it could not bargain away something that was not a subject of bargaining. The Union therefore requested that the parties hold a separate meeting, apart from the contract negotiations, to discuss the unit composition issue.

Newman, LaRoche, Goff, Hayes and Helmus met on June 17, 2004 for approximately 45 minutes to discuss the parties' positions on the unit composition issue. The Town noted that the Commission had never approved the unit and reiterated its belief that the law was quite clear that the positions listed in the Mayor's February 2, 2004 letter were not part of the Union. It told the Union that it intended to offer the employees in the disputed positions individual employment contracts. The Union asked the Town to provide it with case law to support the Town's position. The Town re-

13. The Union did not agree to the proposed ground rules, but, in practice, none of the parties' meetings lasted more than two hours.

14. Because the parties would not know until the fall of 2004 how much state aid the Town would receive in the upcoming year, the Union believed that it would make more sense for the parties to agree to a one-year contract extension, and resume negotiations for a successor agreement once they received the state aid figures.

15. The Union also had prepared proposals and, at some point during the meeting, indicated that if the parties ended up negotiating a successor agreement, it would exchange those proposals at the next meeting.

16. LaRoche testified that there was no discussion of unit composition. Helmus testified that Hayes brought up the issue but that Newman refused to discuss it, stating that this was not the forum to do so, due to its duty of fair representation.

plied that it was looking at some cases, but it did not provide any to the Union. Hayes stated words to the effect that statutorily, the Town had no choice but to take action. The Union disagreed that the Town had the authority to act unilaterally.

The Town also asked the Union to make a proposal regarding unit composition and stated that it was willing to discuss the matter further, if the Union believed that there were certain positions that could be excluded. The Union reiterated that its duty of fair representation to all of its membership prevented it from bargaining about the rights of unit members during collective bargaining negotiations, and that it could not engage in successor bargaining negotiations, with the unit issue outstanding. The Union also indicated that the Agreement obligated the parties to get an adjudicatory decision regarding the unit composition issue. The Town asked the Union whether there was any point in proceeding, because the Union was going to the Commission. It further indicated that it did not wish to spend the time or money to litigate the matter in that forum. The Union repeated that it was willing to meet with the Town to discuss the issue, but that it would not do so as part of collective bargaining. The Town also indicated that it wanted to keep discussing the matter.<sup>17</sup>

At one point during the June 17th meeting, the Town stated that there were two or three positions that it would consider leaving in the S unit. The Union replied that there were two or three that could be removed, but neither party made a substantive proposal regarding specific unit positions. The parties did not indicate that they were at an impasse, or that they had otherwise reached the end of their discussions regarding the issue of unit composition. Hayes asked Newman whether the parties would extend the Agreement with the conditions that the Mayor had proposed. Newman replied that he did not have an answer for him that day. Newman told Hayes to give him a call in the next few days. At the end of the June 17th meeting, the Union believed that it was in the same place that it had been at the end of the June 9th meeting; that the Town would remove the disputed positions from the S unit on July 1, 2004.

On June 21, 2004, Hayes wrote a letter to Newman enclosing an agreement to extend the Agreement for one year. The letter stated that the purpose of the extension was to “maintain the status quo as we understood your intention at our last meeting.”

In or around June 24, 2004, Mayor Forgey spoke at a regularly scheduled Union meeting and told those present that the Town would cease recognizing certain positions in the unit and give them individual employment contracts. The Mayor spoke for about half an hour followed by a question and answer session.

On June 25, 2004, Newman wrote a letter to Hayes stating in pertinent part:

To confirm our conversation this morning; the town/city of Greenfield on July 1, 2004 is intending to unilaterally refuse to recognize members of the bargaining unit, who have been members of SSEA since 1992.

I again urge the city to reconsider its position. However, unless I hear from you to the contrary by the end of business today, I will assume the city is again deciding to act unilaterally without any approval of any court, administrative agency or other authority.

The Union filed the instant charge of prohibited practice on June 28, 2004.

On June 30, 2004, Hayes sent a fax to Newman stating, “This is to confirm our agreement that pending a court appearance in mid-July as to the SSEA bargaining unit issues, the City will not take any further action as to the positions in dispute, or their incumbents, with respect to individual negotiations or change in working conditions.” As described in the *Statement of Case* above, on July 26, 2004, the Town was enjoined from withdrawing recognition from the disputed positions.

Case No. CAS-04-3588

On July 29, 2004, the Town filed a unit clarification petition seeking to exclude twenty-seven (27) positions from the S unit: Accountant, Assistant Town Accountant, Assistant to the Mayor for Economic Development, Chief Assessor, Building Inspector, COA Director, Confidential Secretary to the Mayor (2), Director of Municipal Finance & Administration, Director of Planning and Development, DPW Operations Supervisor (2), DPW Field Supervisor, DPW Water Facilities Superintendent, DPW Management Assistant, DPW Superintendent, Fire Department Confidential Secretary, Health Director, HR Administrative Assistant, HR Director, Library Director, MIS Director, MIS Positions with Administrative Access, Police Department Management Assistant, Recreation Director, Town Clerk, and Treasurer Collector.

During the course of the hearing in this matter, the Town agreed that the Assistant Town Accountant, two DPW Operations Supervisors, and the DPW Management Assistant were properly included in the bargaining unit, and withdrew its petition as to those positions. The SSEA agreed not to litigate the unit placement of the Human Resources Director, two Confidential Secretaries to the Mayor, Director of Municipal Finance and Administration and Assistant to the Mayor for Economic Development, because those positions were either new and/or had never been part of its unit. The Town also withdrew from its petition MIS positions with administrative access. It elected not to litigate the unit placement of the Director of Planning and Development, Human Resources Administrative Assistant, and MIS Director because those positions were vacant at the time of the hearing.<sup>18</sup>

The Town contends that the remaining fourteen (14) positions should be excluded from the S unit, because they fall within one or more of the following categories: department head, supervisory employee, confidential employee, managerial employee, or professional employee not given an opportunity to vote in a separate election. Those positions are described below.

17. The finding, which is supported by the record, was added in response to a challenge by the Town.

18. This finding has been amended in response to a challenge by the SSEA, which is supported by the record.

*Town Accountant*

The incumbent in this position is Michael Kociela (Kociela). The Town Accountant oversees the Town's Accounting Department, which, in addition to the Town Accountant, consists of two C-schedule employees, the Payroll Clerk and the Accounts Payable Clerk. The Town Accountant approves time off for the two clerks and has discussed upgrading those positions with Helmus. The Assistant Town Accountant, an S unit position, has been vacant for over two years.

Under Section 6-3 of the Charter, the Department of Municipal Finance, through the Director of Municipal Finance, assumed "all of the duties and responsibilities related to municipal finance, which prior to the adoption of the Home Rule Charter were performed by or under the authority of the Town Accountant, the Town Treasurer, the Town Collector and the Board of Assessors." Kociela reports to Lane Kelly (Kelly), who is the Director of Municipal Finance and Administration.

Section 6-8 of the Charter provides for a Department of Human Resources that "shall assume all of the duties and responsibilities related to human resources activities, which, prior to the adoption of the Home Rule Charter, were performed by or under the authority of the Town Accountant, Town Treasurer and the heads of Town agencies."

The primary responsibility of the Town Accountant is to establish and maintain sound accounting practices and procedures for the Town. Among other things, the Town Accountant exercises control and auditing procedures over all of the Town's monetary functions; approves and maintains department payrolls; and maintains all accounts payable reports and files, including monthly reports to the Town Council. The Town Accountant also controls and records all receipts and revenues reported by the Treasurer/Collector and other Town departments. He prepares and submits the annual budget for the Town and special articles for the annual Town meeting warrant. Part of this responsibility involves determining if the Town's annual budget is within the statutory levy limit. The Town Accountant maintains custody of all contracts of the Town and keeps a detailed record of all Town debt.

In addition to the above, the Town Accountant oversees the budgeting activities of various Town departments, including the School Department and the Retirement Board. With the Director of Municipal Finance and Administration, he makes final department budget recommendations to Mayor. The Director of Finance, the Town Council and Mayor set the Town's expenditure policies. Much of the information that Kociela uses in determining matters like the levy limit and certifying the Town's free cash are a matter of public record, as is the annual budget. The Town Accountant's books are audited yearly by an outside auditor.

The Town Accountant is a member of the Mayor's senior management team. The senior management team, which is also comprised of the Director of Municipal Finance and Administration, the Director of Planning and Development, the Director of Human Resources and the DPW Superintendent, meets with the Mayor on a bi-weekly basis. Kociela regularly attends those meetings. He has discussed collective bargaining issues with the Mayor and the other participants at these meetings and has been present when expenditure decisions are made.

The Town Accountant does not get directly involved in collective bargaining negotiations. However, Mayor Forgey and Helmus have consulted with Kociela regarding the cost of certain proposed wages and benefits, including health insurance proposals and the budgetary implications of those proposals. On March 11, 2004, Helmus sent a memo to Kociela, Kelly and two other department heads informing them that successor negotiations for the C unit collective bargaining agreement had just begun. The memo provided the dates of future negotiating sessions and notified the recipients that "there will be times and occasions that we may need you to act as a technical consultant (not a negotiator) regarding certain proposals and their impact on either the budget or operations."

The Town Accountant must have a Bachelor's Degree in accounting or business administration, possess at least one year of experience in direct municipal accounting or three years' experience in general accounting employment, and have five years of experience in a supervisory position. Kociela holds a Bachelor's Degree in business and is a certified government accountant with the Massachusetts Municipal Auditors Association.

*Chief Assessor*

The incumbent in this position is Audrey Murphy (Murphy), who, as of the date of the hearing, had held the position for approximately five months. She served as Acting Chief Assessor for five months and was the former Chief Assessor's Administrative Assistant for eleven years.

The Chief Assessor is responsible for managing, supervising and coordinating the programs of the Assessor's Office, which consists of the Chief Assessor; two elected members of the Board of Assessors; the Assistant Assessor, an S-schedule employee; and an administrative assistant, who is in the C unit.

The Chief Assessor is appointed by the Mayor and serves as one of three board members on the Board of Assessors.<sup>19</sup> The Board of Assessors meets every Wednesday in the Assessor's office for approximately 1-5 hours.<sup>20</sup> At those meetings, the Chief Assessor provides updates to Board members regarding the week's activities and other matters, such as approaching deadlines or statutes, of which she thinks they should be aware. The Chief Assessor also has consulted with the Board as to whether to institute changes to

19. Section 6-14 of the Charter provides for a Board of Assessors consisting of three members, including the Chief Assessor who is appointed by the Mayor for an indefinite term. The other two Board members are elected for staggered terms of three years. The Charter grants to the Board of Assessors "all powers which are conferred on Board of Assessors by the General Laws." Section 6-14(c) states that

the Assessor appointed by the Mayor shall be a full-time employee whose compensation is to be determined "by bylaw."

20. The Assistant Assessor also attends Board meetings, but only at Murphy's request.

the Assessor's logbook, and whether to fine residents who do not comply with information requests. The Board is responsible for approving abatements or exemptions that have been requested from residents.

Murphy reports to Kelly, who directs and guides her work on a regular basis and with whom she consults whenever she is uncertain about the scope or extent of her job duties.<sup>21</sup> The Chief Assessor's job description states that the Director of Municipal Finance and Administration sets the policy guidelines for the Department, and that the Chief Assessor works under the "broad policy direction of the Mayor." Murphy testified that she was unaware of any policies in the Assessor's Office. She also testified that after five months in the position, she knows how to perform approximately 50% of the essential functions listed on her job description. Since taking office, she has answered questions from the public, amended property records, enforced deadlines and corrected data. She has conducted an analysis of the Town properties that were sold in 2003 and implemented some changes to how the Assistant Assessor records information about property. Murphy obtained the Board and Kelly's approval before instituting those changes. As of the date of the hearing, Murphy had not yet visited properties, investigated citizen complaints, or made abatements or adjustments.

Murphy spends the majority of her time in the Assessor's Office. The Assistant Assessor spends the majority of his time outside of the office collecting data and entering it into a database that automatically calculates the property's value according to a pre-set formula.

No new employees have been hired in the Assessor's Office since Murphy took office. Murphy did not know who would be responsible for new hires.<sup>22</sup>

In conjunction with the Human Resources Director, Murphy effectively recommended to the Mayor that a probationary employee be terminated.<sup>23</sup> Murphy has consulted with Helmus regarding the time-off provisions of the collective bargaining agreement and, with Helmus, has approved time off for employees in her department.

The Chief Assessor must possess a high school diploma, Bachelor's preferred. In addition, the Chief Assessor must either possess or be able to obtain, within two years of appointment, state certifications of Massachusetts Accredited Assessor (MAA) and either Certified Assessment Evaluation or Certified Massachusetts Assessor. Murphy is a high school graduate and is in the process of

obtaining the necessary certifications for the position. The other two members of the Board of Assessors and the Assistant Assessor have MAA certification.

#### *Building Inspector*

The incumbent in this position is Bruce Austin (Austin), who has held the position for twenty (20) years. The Building Inspector is primarily responsible for the enforcement of the State Building Code, 780 CMR *et al.* The Building Inspector also performs yearly inspections of public assembly buildings (Table 106 inspections) and interprets local zoning ordinances and bylaws.<sup>24</sup>

Building inspections usually are triggered when contractors seeking building permits provide the Building Inspector with the proposed building plans. The Building Inspector determines whether the plans comply with the requirements of the building code, the state architectural access code and applicable zoning bylaws, and continues to perform inspections throughout the construction process until the building is granted a Certificate of Occupancy.

The Building Inspector has the authority to instigate investigations on his own initiative, either in response to citizen complaints or if he has not heard from someone in possession of a valid permit in a while.<sup>25</sup> The Building Inspector also has the authority to go to court to enforce the building code and to issue stop-work orders. Austin has also been involved in updating or reviewing the zoning bylaws. The next review is scheduled to take place in two or three years.

If certain enforcement matters are not subject to an inspection schedule, or are otherwise not time-sensitive, Austin exercises discretion to determine which matters deserve his immediate attention. In Austin's opinion, with one minor exception, he does not exercise discretion in enforcing the building code.<sup>26</sup>

In addition to Austin, the Inspections Department includes a Local Building Inspector, who also serves as the Town's Sealer of Weights and Measures. Both positions are half-time and in the S unit. Austin, in conjunction with the Human Resources Director, interviewed and hired the current Local Building Inspector. Until a few months before the hearing in this matter, the Local Building Inspector reported to Austin. However, as of the date of the hearing, they no longer shared an office, and Austin did not know to whom this employee reported or who assigned his work.

The Inspections Department also employs fire, plumbing, electrical, and gas inspectors.<sup>27</sup> The fire inspector is hired by the fire department, and is part of the F unit. The Town hires the gas, plumb-

21. Murphy and Kelly's offices are both located in the Town's Customer Service Center.

22. Section 3-3(a) of the Charter states in pertinent part: "All persons categorized as department heads shall, subject to the consent of the Mayor, appoint all assistants, subordinates and other employees of the agency for which such person is responsible."

23. The record does not reveal the position or payroll classification of the probationary employee. However, because the only two S-schedule positions in this department are the Chief Assessor and the Assistant Assessor, and the Assistant As-

essor has held that position for 16 years, it is reasonable to infer that the probationary employee was a member of the C bargaining unit.

24. This finding, which is supported by the record, was added at the Town's request.

25. This finding has been modified at the request of the Union

26. According to Austin, that exception is found in Chapter 34 of the building code, which allows an inspector to determine whether an egress is hazardous.

27. One individual serves as both the plumbing and the gas inspector.



ing and electrical inspectors, who work out of their homes. These inspectors, who are not S unit members, are responsible for enforcement of codes other than the building code (e.g., gas, plumbing and electrical codes). Austin reviewed the job applications of the gas, plumbing and electrical inspectors but does not oversee their work, unless he receives a complaint. Austin has not hired any new employees since the Town Charter was passed.<sup>28</sup>

The Inspections Department falls under the control of the Department of Municipal Finance and Administration, and Austin reports to Kelly. Austin does not receive daily instruction from Kelly, nor does Austin believe that anyone in Town government has the authority to veto any of his conclusions regarding whether a building or building plan is in compliance with the various codes that he enforces. Austin provides Kelly with a copy of all correspondence that he prepares.

The Building Inspector is required to possess a Bachelor's Degree and hold a certification from the Massachusetts State Building Board of Regulations and Standards. That certification requires 15 hours of continuing education yearly. Austin meets both requirements and belong to the Massachusetts Building Commissions' and Inspectors' Association.<sup>29</sup>

*Council on Aging Director*

As of the date of the hearing, the incumbent in this position was Robert Stowe, Jr. (Stowe), who had held this position for the past year and a half. The Council on Aging (COA) serves residents of Greenfield 55 years of age and older and certain residents with disabilities. The COA operates a Town Senior Center, where the COA's activities and services take place and where Stowe's office is located.

Section 6-18(c) of the Charter provides that the COA Director "shall be charged with the day-to-day administration of the Senior Center, subject to the personnel policies of the Town, the direction of the Mayor, and the bylaws and policies of the COA." Under the Charter, the COA selects the Director. The COA's chairperson selected Stowe.

Stowe's duties include identifying and assessing community needs for services to the senior population; developing short and long-range plans and objectives to respond to identified needs; reporting to the COA Board at scheduled meetings; planning and administering a comprehensive social, recreational and education program for elders; recruiting, selecting, hiring, training and supervising staff; identifying and applying for funding grants; and overseeing the physical operation of COA facilities.

The COA employs a total of five employees. Stowe directs the performance of his staff, who report to him on a daily basis. The department includes a part-time fiscal manager, who also works as a part-time medical ride coordinator; a part-time custodian; an Ac-

tivities Director and a Wellness Coordinator. Both the Activities Director and Wellness Coordinator are S-unit members. The Wellness Coordinator, who is a registered nurse, provides wellness information, runs blood pressure clinics, leads exercise classes, and researches and consults daily with residents about health issues. The Activities Director also manages and leads exercise groups and other recreational activities provided at the Center.

Section 6-18(a) of the Charter provides for a COA comprised of 3-15 members who are appointed by the Mayor for staggered three-year terms. As of the date of the hearing, the COA had fifteen (15) members. Stowe's job description states, and he does not dispute, that he works under the policy direction of the COA.

Section 6-18(d) of the Charter grants to the Director the authority to hire all employees of the Senior Center, "subject to the approval of the Mayor and within the limits established by collective bargaining agreements or otherwise; to define their duties; and to make recommendations for discharge." Stowe has hired one employee since taking office. Stowe worked with a COA subcommittee and the Human Resources Director throughout the hiring process, but Stowe made the final hiring decision. Stowe has not disciplined, discharged, or evaluated any COA employees and did not know to whom he would give his recommendation to discharge an employee.

Stowe reports to the Mayor for policy and budgetary issues and any other issues about which he believes she should be informed. Stowe oversees and approves all daily expenditures. He prepares the COA's budget, which is presented to a subcommittee of the COA. The subcommittee presents it to the full COA, which then presents it to the Mayor.<sup>30</sup>

Stowe makes his own decisions regarding the content of COA programs, and he has implemented new programs since becoming Director. He does not need the COA's approval to implement new programs, although he has sought their input into how to spend extra grant monies.

The COA contracts for outside services on a regular basis. All contracts are negotiated from a template, and both the Activities Director and the Wellness Director negotiate those contracts with Stowe's full knowledge and approval.

Stowe has not been involved in collective bargaining and is unaware of what, if any, his responsibility would be in that regard.

The incumbent in this position is required to possess a Bachelor's Degree with a concentration in social service or gerontology or a like field. A Master's Degree is preferred. Stowe has a Master's Degree in Divinity.

28. These findings were amended in response to a challenge by the SSEA, which was supported by the record

29. These findings, which are supported by the record, have been modified in response to a challenge by the SSEA.

30. Section 6-18(b) of the Charter states that the COA director "shall consult with the Mayor prior to submission of the . . . budget to the Town Council for appropriation."

*DPW positions**DPW Superintendent*

John Bean (Bean) has been the Superintendent of the DPW for 18 years. Bean is responsible for all the functions performed by the DPW, which employs approximately 56 employees. The DPW consists of the following divisions: water supply; sewage collections and treatment; solid waste collection and transportation; and highway, parks and tree maintenance. Six titles report directly to Bean: Water Facilities Superintendent Sandra Shields (Shields), Field Superintendent James Garanin (Garanin), Engineering Superintendent Lawrence Petrin (Petrin), Vehicle Maintenance Manager Paul Newell (Newell) and Office Manager Janine Brooks (Brooks).<sup>31</sup> All of these positions are in the S unit. Bean testified that Shields, Garanin and Petrin are the equivalent of Assistant Superintendents in their respective areas.<sup>32</sup> All three titles are compensated at salary grade 16.<sup>33</sup> Bean reports directly to the Mayor and is member of the Mayor's Senior Management Team. He regularly attends the Mayor's bi-weekly senior management meetings.

Bean's primary function is to organize, direct, plan and administer all public works functions through subordinate assistant superintendents, foremen, and other personnel. The position delegates considerable authority for the performance of technical and day-to-day administrative activities to divisional superintendents and assistant superintendents, as the major emphasis for the DPW Superintendent position is on overall administration and coordination. For example, Bean relies on supervisors to make decisions regarding purchasing of construction equipment. Bean works with Petrin to make decisions regarding office equipment. Bean takes the lead in purchasing and implementing software, although Petrin has helped him understand how the water billing software works. Petrin and his staff prepare public bids for materials or contractual work.

Shields and Garanin interview candidates for positions in their respective departments and make recommendations for hire to Bean. Bean decides whether to hire those individuals, but he would not do so without the Mayor's approval.<sup>34</sup>

Bean attends W unit collective bargaining negotiations as a technical advisor but does not attend S or C unit negotiating sessions. The Human Resources Director advises Bean of upcoming DPW negotiations and asks him for his input into contract changes. Bean

also asks his staff to provide him with suggestions for contract changes.

Bean has written regulations and bylaws for the various DPW divisions. For example, approximately 8-10 years ago, Bean re-drafted the solid waste regulations of the Town. Those regulations were reviewed by the Town Manager but adopted *verbatim* by the Town Council. Shields also has revised existing sewer regulations, but they were reviewed by Bean, who ultimately determined whether they would be implemented.

Bean also establishes other policies for the DPW but consults with the Mayor before implementing any policy that involves the public or a contractual obligation, such as the number of vehicles in the DPW fleet. Bean does not consult with the Mayor before implementing purely internal DPW matters, like an employee code of conduct. Bean is solely responsible for communicating all DPW policy matters to the Mayor.

Bean prepares the DPW budget and is the sole presenter of that budget to the Town Council. He asks for budget recommendations from his assistant superintendents, but with the exception of Shields' Water Facilities budget, he modifies those budgets before submitting them to the Mayor for her review. Budget matters require the Mayor's review, recommendation, and then a vote by Town Council.

The DPW Superintendent must possess a 4-year degree in a related field and 7-10 years of related experience. Bean has a Bachelor's Degree in civil engineering and is a registered professional engineer in the Commonwealth.

*DPW Field Superintendent<sup>35</sup>*

The incumbent in this position is Garanin, who has worked for the DPW for 29 years. Garanin has held the title of DPW Field Superintendent for approximately one year. Garanin, who reports directly to Bean, runs the Water Division, the Sewer and Drain Division, and the Solid Waste Divisions of the DPW. Garanin is also the general foreman of all other highway garage operations. There are no other foremen or supervisory employees beneath him, other than the Operations Supervisor (also referred to as the Assistant Field Superintendent).<sup>36</sup>

Garanin's responsibilities include assigning work to the crews in all the divisions that report to him, making sure that those crews are present and accounted for, and that they have the necessary

31. As described in detail below, for a period of time, Irv Sanders (Sanders), the Department of Public Works Operations Supervisor, reported to Bean. However, during the course of the hearing, Bean decided that Sanders should report directly to Garanin.

32. The Town challenged the Hearing Officer's finding that Shields, Garanin, and Petrin are considered Assistant Superintendents. After reviewing the record, we have modified this finding to reflect that during his testimony, Bean referred to these employees as Assistant Superintendents in their respective areas. However, other than Bean's testimony, there was no evidence that the employees in these positions are Assistant Superintendents.

33. The Town seeks to exclude Garanin and Shields, but not Petrin, from the S bargaining unit.

34. Bean has not filled any positions in the DPW since the Charter went into effect.

35. The recommended findings of fact referred to this title as the "DPW Field Supervisor." The Town asserts that the correct title is "Field Superintendent," and we have modified the finding accordingly. We note however that in the MOU attached as Appendix 1, the position is listed as "DPW Field Supervisor." We assume therefore that the parties have used the titles interchangeably.

36. The Town requested a finding that the Assistant Field Superintendent (Operations Supervisor), the Vehicle Maintenance Foreman and the Assistant Foremen are beneath Garanin on the DPW organization chart. The record reflects however that the Vehicle Maintenance Foreman reports directly to Bean, and contains no information about the Assistant Foremen. We have therefore modified this finding only to reflect that the Operations Supervisor reports to Garanin.

equipment and vehicles to do their jobs. Garanin has no responsibility for collective bargaining, budget preparation, DPW policy matters or performance evaluations.

With respect to his supervision of W unit employees, Garanin follows and evaluates the work progress of all the divisions reporting to him. He anticipates or investigates causes of delay or inadequate performance and takes corrective action within the limits of established practice. He handles first level grievances. Garanin consults Bean with respect to disciplinary matters. On one occasion when Garanin believed discipline was warranted, Bean told Garanin to write a “speed letter” to that employee for Bean’s signature. Sanders, the Operations Superintendent, also has consulted with Garanin regarding disciplinary issues.

With respect to his supervision of S unit employees, Garanin testified in October of 2004, during the hearing of this matter, that Sanders reported to Bean and not to him. However, at some unspecified time between October 8 and November 11, 2004, Bean decided that Sanders should report to Garanin. Sanders continues to meet with Bean on a weekly basis. Garanin does not supervise any management team positions.

This position requires a high school diploma, Bachelor’s preferred, and 10 or more years of professional construction engineering management or administrative experience. A number of special drivers licenses are required, as well as a Grade D Massachusetts Water Distribution Operator’s license.

*Department of Public Works Water Facilities Superintendent*

Shields has held this position for 19 years and has worked in the Water Facilities Department as a chemist for a total of 30 years. Shields’ primary responsibility is to ensure water quality for the Town.<sup>37</sup> She implements and enforces federal, state and local statutes and regulations concerning water and sewer use, including laws regulating the operation of the wastewater and water treatments plants, backflow prevention programs, safe drinking water, hazardous waste, and surface water treatment. Shields also functions as the Town Chemist. She is responsible for the management, operation, and maintenance of the water facilities of the Town, including water and wastewater treatment facilities, a 3.5 million gallon sewage treatment plant, three sewage pump stations, a reservoir, the river water supply, two dams, two storage towers and a water station and related facilities. Her specific duties include performing tests for water quality, inspecting the various facilities, and overseeing Water Facilities Department employees.

Greenfield has its own water and sewer use bylaws that are based on federal EPA requirements. Shields has redrafted many sections of the sewer use bylaws, but, as noted above, Bean retains the ultimate authority to determine their content. Shields has no responsibility for formulating the state statutes or regulations that she implements, but her job duties require her to know them and to enforce them. Both Shields and Bean attend state-sponsored workshops regarding new laws or regulations that will require making changes to the Town’s water policy or equipment.

There are 6.5 full-time equivalent personnel who work below Shields: two S-unit employees, a half-time Lab Technician and an Operations Supervisor; and five W-schedule employees: a potable water operator, a wastewater operator, two technicians and an apprentice. All Water Facilities employees work at the Town’s wastewater plant, which is located a mile and a half from Town Hall. Shields reports directly to Bean.

Shields interviews outside candidates for hire, along with the Human Resources Director, but, as described above, Bean retains final hiring authority for all DPW positions. Inside hires for W unit positions are determined exclusively by seniority. Bean sets the personnel policies for the Water Facilities Department.

When Water Division employees want to take time off, they enter the dates on a shared calendar. Time off for W unit employees is determined largely by seniority. Bean has implemented a policy prohibiting S unit employees from taking scheduled time off at the same time. Therefore, when Shields takes time off, the Operations Supervisor must cover for her, and vice versa.

Shields submits an annual draft budget to Bean, who does not typically modify it. Shields has been drafting budgets for her department for the last 28 years. It takes her a morning to draft the budget, partly because her division has numerous fixed expenses, such as electricity.

Shields prepares her own bids for equipment but uses boilerplate contracts to do so. The Mayor must sign any department contracts. Decisions regarding the purchase of new equipment or construction of new facilities are for the most part dictated by federal and state mandates.

Shields is the only non-department head with whom Helmus consulted during the most recent round of collective bargaining negotiations. The Town adopted one of Shields’ proposals regarding licensure. Shields is the first-level grievance officer at the water plant.

This position requires a Bachelor of Science degree in chemistry with a minor in bacteriology and or biology, along with advanced specialized knowledge not available at the undergraduate level. A state or Massachusetts certified plant operator’s license is also required, as is a water plant operator’s license. Shields possesses a Bachelor’s Degree in public health and numerous state certifications related to wastewater, water treatment and sanitation. All of the other employees in the wastewater division, other than the lab technician and one entry-level grade 5 position, also possess relevant certifications.

*Fire Department Confidential Secretary*

The incumbent, Diane Lively (Lively), has held this position for approximately one year. The job description, which was revised in August of 2003, states that this title “performs responsible and confidential secretarial, administrative and clerical assistance to the Fire Chief in the operation of a municipal fire station.” Under the heading “Environment,” the job description states, among

37. Greenfield does not belong to a separate water district.

other things: “Has access to or is privy to confidential information subject to non-disclosure or limited disclosure pursuant to law or regulation, including collective bargaining information and other town or departmental level information.”

Lively processes payroll for the firefighters, does all accounts payable and purchases supplies. She prepares and processes billing for the following Fire Department activities: issuing permits or reports; fire extinguisher training; special events, like fairs or music fests; and department services administered in response to certain types of accidents. Lively also types and drafts general correspondence, handles calls not taken by the Fire Department dispatcher, and calculates the cost of services provided by the Department. She maintains reports prepared by firefighters, such as logs of fire engine and breathing apparatus inspections, but does not analyze them. She also maintains other reports for the Fire Department, including reports that detail each call the Fire Department makes and budget reports. Lively performs the majority of the tasks set forth above independently.

Lively reviews the firefighters’ collective bargaining agreement to ensure compliance for purposes of payroll (e.g. vacation, compensatory time, callback pay, etc.) and informs firefighters about their “use or lose” time. However, Lively has never seen or typed any proposal about collective bargaining in advance or been involved in the bargaining or grievance process. Lively was employed in the Fire Department in the spring of 2004, when F unit negotiations were taking place. She was aware of these negotiations but neither scheduled nor discussed them with Helmus or the Fire Chief.<sup>38</sup> Lively is the only Fire Department employee who is a member of the S bargaining unit.

Lively’s office is separated from the Fire Chief’s office by a door, which remains open most of the time unless the Fire Chief closes it for privacy. The Fire Chief has his own computer on which he is able to communicate with the Human Resource Director directly.

#### *Health Director*

The Health Director is in charge of the Health Department, which presently employs two other individuals, the Public Health Sanitarian, an S unit position, and a shared clerical employee, who is a member of the C unit. The incumbent Health Director is Lisa Hebert (Hebert), who has held this position for the past fifteen (15) years.<sup>39</sup>

The Health Director is charged with enforcing the state Health Code and the daily operations of the Health Department. Hebert spends 80-90% of her working time performing housing inspections. She spends the rest of her time making lead paint determinations, witnessing perc tests,<sup>40</sup> reviewing septic plans, inspecting children’s camp sites and pools, issuing temporary permits, and collecting and testing dead birds for West Nile virus.

Most of the inspections Hebert performs are triggered by tenant complaints about housing conditions. If the inspection discloses violations, she issues a list of violations to the property owner, who is given the opportunity to correct them. If the property owner refuses, the Health Director is authorized to take the property owner to court or to condemn the property. Hebert has, on occasion, condemned property without having first given the owner the chance to correct the deficiency. The property owner can appeal the Health Director’s determination to the Board of Health,<sup>41</sup> which then conducts a hearing at which Hebert presents her findings. The Board occasionally asks Hebert her opinion on the appeal but does not always adopt her recommendation. In general, the Board of Health leaves most of the daily operations of the Health Department to Hebert, although Hebert occasionally discusses how things are going with the Board’s chairperson.

Daniel Wasiuk (Wasiuk), the Town’s Public Sanitarian, performs most of the Town’s restaurant inspections. Hebert performs restaurant inspections when Wasiuk is unavailable. Wasiuk is certified to perform the other inspections that Hebert performs, except septic system inspections. Like Hebert, Wasiuk is authorized to issue a list of violations and shut down establishments and/or issue fines, if, in his opinion, such action is warranted.<sup>42</sup> Thus, Hebert and Wasiuk generally can and do perform their own jobs interchangeably.<sup>43</sup>

Hebert considers herself Wasiuk’s supervisor. If Hebert discovers a problem with Wasiuk’s work, she will discuss it with him directly, if she believes the problem can be resolved in that manner. If not, she addresses the matter with the Board of Health. Wasiuk, who has worked for the Health Department for approximately four years, generally sets his own schedule<sup>44</sup> but performs additional duties at Hebert’s request. Hebert keeps her own schedule and does not review Wasiuk’s schedule.<sup>45</sup>

The Health Director has no responsibility for collective bargaining. She prepares her own budget, which presently consists of a

38. The Town presented no testimony to rebut Lively’s claim that she was not involved with, and had no advance knowledge of, collective bargaining matters. However, before Lively testified, Helmus testified that he communicates with the Fire Chief and his assistant with respect to costing out proposals during contract negotiations, and that he sends copies of draft proposals through the Chief’s assistant. (The Town’s brief indicates that the Fire Chief is a member of Greenfield’s negotiating team for firefighter collective bargaining negotiations.) The Hearing Officer found that Lively testified consistently and credibly regarding all of her job duties, as to which she has first-hand knowledge, and credited her testimony in its entirety.

39. The job description for this position dates from 1972.

40. A perc test is performed in the field to determine the design, size and soil permeability of a failed septic system.

41. Section 6-16 of the Charter establishes a Board of Health consisting of three members appointed by the Mayor for a staggered term of three years, one of whom must be a physician or a licensed qualified health care professional. At the time of the hearing, the Board of Health was comprised of a physician, a nurse and a chiropractor.

42. The Town does not contest the Public Sanitarian’s inclusion in the S unit.

43. This finding, which is supported by the record evidence, has been added at the Union’s request.

44. Wasiuk’s schedule is determined largely by the fact that food service investigations must be performed twice yearly.

45. This finding, which is supported by the record evidence, has been added at the request of the SSEA.

line item for salary and a few other items. She has not defended that budget before the Town Council since the Charter went into effect.<sup>46</sup>

Hebert holds two Bachelor's degrees, has registered Sanitarian credentials from the Commonwealth, and is working towards a Master's Degree in Public Health.

*Library Director*

This position is responsible for the day-to-day administration of library operations and services in accordance with policies established by the Board of Trustees of the Public Library.

Section 6-12(a) of the Charter provides for a seven (7) member Board of Trustees appointed by the Mayor and approved by the Town Council for staggered three-year terms.

Section 6-12(b) of the Charter states in part:

The Board of Trustees of the Public Library shall set policies that affect the internal operations of the library. The Board shall have the custody and management of the Library and reading rooms and of all property, including Library trust funds, of the Town Library devoted to Library purposes, subject to the following conditions: all funds raised or appropriated by the Town for the support and maintenance of the Library shall be expended under the direction of the [Board of Trustees] subject to the approval of the Mayor. The Mayor, Library Director, and the Chairperson of the Library Trustees shall consult each other prior to the submission of the Library budget to the Mayor for appropriation.

Section 6-12 (c) states:

The Mayor, shall, in addition, have the following powers and duties to appoint the Director upon the recommendation of the Board of Trustees and such Director shall be in charge of the day-to-day operations of the Library, subject to the personnel policies of the Town and the Direction of the Board of Trustees.

Section 6-12(d) of the Charter grants the following duties and powers to the Library Director:

1. To approve all other officers and employees connected with the Library upon the approval of the Mayor within the limits established by collective bargaining agreements or otherwise to fix their salaries, define their duties, make rules concerning their tenure of office and to discharge them.
2. To make all reasonable rules and regulations for the operation and management of the Library in consultation with the Mayor.<sup>47</sup>

Section 6-12(e) of the Charter states that the Board of Trustees shall:

[I]n all matters of general municipal policy and procedures, be subject to policy directives designed to achieve uniformity and better

administrative control as may from time to time be issued by the Mayor. . . .

Section 6-12 of the Charter provides for a seven-member Library Board of Trustees, who are appointed by the Mayor, with approval by the Town Council. Pursuant to Section 6-12(b), the Board of Trustees sets "policies that affect the internal operations of the library."

Diane Ryan (Ryan) has been the Town's Library Director for almost five years. She attends monthly Board of Trustees meetings. Those meetings last approximately 2-3 hours and are open to the public. Ryan also occasionally consults with members of the Board by telephone, e-mail or in person.

The Library employs a number of other employees, whom Ryan considers department heads, including an Assistant Library Director,<sup>48</sup> an Adult Services Librarian, an Assistant Director/Reference Librarian, a Technical Services Librarian and a Children's Librarian. The Library's staff includes a number of other positions that report to those "department heads," and not to Ryan directly, such as the Technical Service Assistant, who reports to the Technical Services Librarian.

Ryan hires lower-level employees, such as pages, without assistance from the Human Resources Department. The Human Resources Director assists Ryan in the hiring process for higher-level positions. The Mayor or the Board of Trustees does not review those hiring decisions, although Ryan acknowledged that under the Charter, the Mayor is the ultimate appointing authority. All of Ryan's staffing decisions are subject to review by the Human Resources Department and the terms of the collective bargaining agreements covering those employees.

Ryan makes her own decisions, without input from the Board of Trustees, regarding the content of the Library's collection. Ryan drafts other policies that are subject to Board of Trustees' approval. At least one such policy matter relating to reciprocal borrowing arrangements with other municipal libraries has been under review by the Board of Trustees for approximately 8-9 months. Most policies that Ryan brings to the Board for Trustees are adopted at the monthly meeting following the one in which Ryan first introduced the policy. Examples of these policies include a confidentiality policy and a materials selection policy. Other than the reciprocal borrowing policy, Ryan could not recall an instance where the Board of Trustees either modified or rejected a policy that she had proposed. Ryan also has consulted with Helmus regarding certain policies, such as the Library's Internet policy, before submitting it to the Board of Trustees for their approval.

46. The record does not clearly reflect whether the Director of Public Health reports directly to the Mayor or to Kelly. The Town provided two organization charts, one of which shows the Health Department falling under the Department of Municipal Finance and Administration, and one that shows the Department directly beneath the Mayor. Neither Helmus nor Hebert testified as to this issue. The Hearing Officer declined to make a finding regarding this fact.

47. Human Resources Director Helmus regularly attends Library Board of Trustees meetings to ask the Library Director's advice about particular matters af-

fecting employees. Helmus attends other Town Board or Commission meetings on a sporadic basis only, usually in connection with hiring matters.

48. The Assistant Library Director is presently in the C unit, although the record reflects that once the incumbent leaves the position, it will revert to the S unit. None of the other library titles are included in the MOU.

Ryan prepares the Library's budget. After presenting it to the Board of Trustees, it is submitted to the Mayor's Office and then to the Town Council. Last year, Ryan presented the budget to the Mayor herself.

Ryan has participated, as a technical adviser, in C-unit collective bargaining negotiations. Helmus also has sought Ryan's input on the existing clerical contract. Over the last five years, Ryan has participated in one formal grievance meeting concerning a W unit employee.

The Library Director is required to possess a Master's Degree in Library Science (MLS) and at least five years of responsible experience in public library management and administration. Ryan has a MLS and over 25 years of relevant experience.

*Police Department Management Assistant (PDMA)*

The incumbent in this position is Christine Scott (Scott).<sup>49</sup> The job description for this position, which was prepared in September of 2001, states that the PDMA performs:

[H]ighly responsible and confidential administrative, supervisory and management duties in the operation of departmental MIS and data functions, Emergency Dispatch Operations center, and the personnel/payroll functions of a municipal police station.

Under "Environment", the job description states that this position:

Has daily access to confidential information subject to non-disclosure or limited disclosure pursuant to law or regulation, including collective bargaining information when assisting the chief.

The PDMA is responsible for departmental payroll and attendance functions, which include keeping records of overtime, range pay, dry cleaning and/or clothing expenses, court, grant and sick time, step increases and other personnel actions that affect pay. She also prepares the payroll and breaks down figures concerning outside details and wages. The PDMA maintains Department account balances, expenditures, and reimbursements as well as oversees reporting functions.

This position works under the direct supervision of the Chief of Police, captains and lieutenants, and oversees the work of other civilian staff, none of whom are in the S unit. The PDMA has frequent contact with Department employees, other Town departments, outside organizations, vendors and the general public.<sup>50</sup>

During the 2004 collective bargaining negotiations, Captain Guilbault assisted Helmus in the C unit negotiations in the Police Chief's absence. Scott sat in on negotiations as Helmus' technical advisor in Captain Guilbault's absence and assisted Helmus in calculating the economic impact of the parties' proposals.<sup>51</sup> Scott performed the same duties for the previous Police Chief.

The PDMA must possess a high school diploma or GED and have five years of experience.

*Town Clerk*

The incumbent in this position is Maureen Winseck (Winseck), who has been Town Clerk since 1991. In July of 2003, the Town Council reappointed Winseck for a three-year term.

The Town Clerk is responsible for issuing hunting, fishing, dog and marriage licenses; recording vital statistics; signing and applying the Town Seal to certain official documents; registering voters; providing information to Town residents; supervising all matters relating to elections, including registration of voters and custody of election machines; and preparing or maintaining various other records for the Town.<sup>52</sup>

The Town Clerk records liens and issues business certificates and certificates of registration for flammables. Lawsuits against the Town are filed with the Town Clerk's Office. The Town Clerk additionally serves as the Clerk of the Town Council.

The Town Clerk is also one of four Town Registrars of Voters<sup>53</sup> that are responsible for the registration of voters.<sup>54</sup> In her capacity as a Registrar of Voters, Winseck conducts a census each year, from which her office compiles a list of Greenfield residents age 17 or older.

Article 2 of the Charter is titled "Legislative Branch." Section 2-8 of the Charter is titled "Officers Elected by Town Council." Subsections (b), (c) and (d) of this section state:

(b) *Town Clerk* - The Town Council shall elect a Town Clerk to serve for a term of three (3) years and until a successor is chosen and qualified. The Town Clerk shall have the powers and duties relating to the keeping of records and vital statistics, the regulation and conduct of elections, the highway book and the issuance of licenses as are provided to Town clerks by General Laws and such additional powers and duties as may be provided by General Laws, by Charter, by bylaw or by other vote of the Town Council.

(c) *Clerk of the Council* - The Town Clerk shall be the Clerk of the Town Council. The Clerk of the Council shall give notice of its meetings to its members and to the public, keep the minutes of its proceedings and perform such other duties as may be provided by bylaw or by other vote of the Town Council.

(d) *Removal/Suspension* - Any person elected by the Town Council may be removed or suspended by the Town Council by the use of procedures substantially the same as those contained in section 3-4(b).

The Town Council voted to appoint Winseck as Town Clerk at a meeting held on July 16, 2003. The minutes of the meeting state that:

49. Neither Scott nor the Police Chief testified at the hearing.

50. This finding, which is supported by the record evidence, has been added at the request of the SSEA.

51. The record does not clearly reflect whether Scott had access to those proposals before other bargaining unit members.

52. The Town Clerk's job description dates from 1979.

53. Section 6-17 of the Charter states that "there shall be a Board of Registrars of Voters consisting of four (4) members, appointed by the Mayor, with Town Council approval."

54. The Registrar's function of registering voters is to be distinguished from the Town Clerk's function of conducting elections.

Councilor Guin read Home Rule Charter section 3-2(d) for clarification. This section stated the Town Council appoints the Town Clerk; however the Mayor would oversee the daily supervision of the Town Clerk and office.

Approximately 95% of Winseck's time is spent performing tasks for the Town of Greenfield. She spends the rest of her time performing tasks for the Town Council, including reviewing agenda items submitted for Council review; reviewing requests from the public to the Council; and submitting those requests to the Town Council's administrative assistant, who works in the office of the Town Council.<sup>55</sup> Winseck attends and records the monthly meetings of the chairs of the various Town Council committees. Winseck also prepares the Town Council budget and gives it to the president of the Council who signs off or makes changes to it.

In addition to Winseck, there are three employees in the Town Clerk's Office: two S unit employees, the Assistant Town Clerk and the Administrative Assistant to the Town Council, and one C unit employee. On at least one occasion prior the implementation of the Charter, Winseck effectively recommended that discipline be taken against one of the employees who reported to her, but the record does not reflect whether the employee was a member of the C or the S unit.

Mayor Forgey considers Winseck to be a Town department head and, as such, sends Winseck the same memos that she sends to other department heads. However, because the Charter provides that only the Town Council has the authority to appoint and remove or suspend the Town Clerk, the Mayor does not consider herself responsible for the day-to-day supervision of the Town Clerk. For that reason, on June 14, 2004, Mayor Forgey sent a memo to Town Council President Daniel Guin (Guin) regarding "Charter Change: Officers Elected by Town Council." The memo stated:

Section 2-8(b) & (c) *Officers elected by Town Council*

*Recommendation:* That the positions of the Town Clerk and the Clerk of the Town Council be split into two separate positions with separate appointing authorities. The appointment of the Town Clerk should fall under the authority of the Mayor and be included in the language of Section 3-3. The appointment of Clerk of the Council should be the responsibility of the Council. . . .

*Rationale:* The two positions have discrete functions, one related to executive and administrative side of the government, the other solely under the jurisdiction of the Council, with all the duties and responsibilities directly focused and committed to the support of the Council in its legislative duties.

As of the date of the hearing, this proposal was still under review by the Town's Appointments and Ordinances Committee.

Mayor Forgey has instituted a policy requiring all department heads to notify her of their vacations or other extended time spent away from the office. On August 18, 2003, Winseck wrote to Mayor Forgey requesting time off the following week. Mayor Forgey replied, "Congratulations and happy anniversary and enjoy your trip!" On January 16, 2004, Winseck e-mailed a vacation request to Mayor Forgey and Guin, with copies to Helmus and Kelly. Mayor Forgey's first response indicated that she had "no problem" with the request but asked who would be in charge while Winseck was away. Winseck provided her with the name of the responsible employee, and the Mayor wrote back, "Vacation approved."

On June 25, 2004, Mayor Forgey sent an e-mail to Winseck directing her to distribute copies of the certified budget to only herself, Kelly, and Kociela, and not to all department heads, as Winseck had done.

On September 14, 2004, Winseck wrote to Mayor Forgey asking whether she and the Assistant Town Clerk could take a day off after Election Day, because they anticipated working 18 hours that day. Mayor Forgey denied the request stating, "I cannot sanction the time off request as it currently stands. My expectation is that all staff will be there unless of course people use vacation or personal time to take a day off." Also in September of 2004, Winseck e-mailed Mayor Forgey with a request to go to a conference. The Mayor replied that she wanted to see the paperwork. In or around October of 2004, Winseck asked Kelly whether she could delay sending out delinquent dog letters until after the November election.<sup>56</sup>

On October 1, 2004, Kelly wrote a lengthy e-mail to Winseck, stating among other things:

[A]s far as the dogs are concerned be clear on one thing. The [delinquent] dog letters will go out before the November elections . . . [C]onsistency is another goal the Mayor has made for us and we will achieve it. So, the dog letters will go out and the addressees will be given 14 days to pay. . . . While I cannot say anyone in your office has been looking terribly overworked this week with town business, I will give you this choice: you can either take the payments there or the Customer Service Center will take them. I will be amending the letter [name omitted] sent down by Monday, so take the weekend to think about it.

Kelly's October 1, 2004 e-mail also addresses Winseck's apparent concerns regarding her workload and the Town's plans to move

55. The Town Council's office and the Town Clerk's office are both located in the Town Hall, but on different floors.

56. Winseck testified that she wrote to Kelly because Kelly was part of the Mayor's senior management team, and because the Town Clerk's Office had been put under Kelly as part of that team. Neither of the two organization charts provided by the Town reflects that the Town Clerk's Office reports to Kelly. Rather, one chart depicts the Town Clerk's Office as a separate department reporting to the Town Council, and another undated chart, purporting to show the Mayor's direct reports, contains no mention of the Town Clerk's Office. However, Winseck testified, as

corroborated by Recreation Director Buntin, that sometime in the fall of 2003, a flow chart was distributed at a meeting of department heads. Winseck could not recall who distributed the chart. The flow chart, which is undated, has a solid line connecting the Town Clerks Office to the Department of Administration and Finance. The chart lists Kelly as "Operating Manager" and further places the Town Accountant in charge of the "finance department." Because the chart is undated and does not accurately reflect the positions held by Kociela or Kelly as of the date of the hearing, the Hearing Officer gave it no weight, to the extent that it purports to establish that the Town Clerk reports to Kelly.

some of the Town Clerk's responsibilities to a newly created "customer service center." It states, in part:

You made one of your goals for FY 05 getting rid of fish and game because it's not worth all the work. . . . And to lighten your load more, dogs will be coming down too. This should leave you plenty of time to concentrate on vitals, the various elections, and say cleaning up the vaults. In addition, you may be gaining another responsibility; in a city, the Clerk maintains all contracts for the municipality. We will be exploring that opportunity.

Before Mayor Forgey was elected, Winseck fixed her own schedule for sending out delinquent dog letters and other matters for which there is no fixed deadline.

*Treasurer/Collector*

Kelly, who also holds the position of Director of Municipal Finance and Administration<sup>57</sup> and is a member of the Mayor's senior management team, presently occupies this position.<sup>58</sup> The Treasurer/Collector is responsible for the overall administration, management and operations of two municipal finance divisions, the Office of the Collector and Office of the Treasurer. The incumbent in this position is responsible for the collection, processing, record keeping and enforcement of all municipal taxes and fees, as well as the receipt, recording, custody management and disbursement of all municipal funds, including the Town's retirement funds. The Treasurer/Collector also has responsibility for borrowing, investing and managing Town funds and for determining when to go to the Appellate Tax Board or to the Land Court to seize property for taxes.

The position, as presently staffed, reports directly to the Mayor.<sup>59</sup> There are several other positions in the Treasurer/Collector's Department, including the Assistant Treasurer/Collector, an SSEA bargaining unit position, and five C unit employees. Helmus testified that the Treasurer/Collector supervises the Assistant Treasurer/Collector, but he provided no details in support of this assertion. The job description, which was prepared in December of 2000, states that the position "supervises 10 or fewer employees within a collective bargaining environment." It further states that the Treasurer/Collector "appoints, oversees, and sets policy guidelines for the Deputy Collector of taxes."

The Treasurer/Collector is required to have a Bachelor's Degree in accounting, economics, business administration or a related field and broad experience in municipal financial management.

*Recreation Director*

Buntin has held this position since 2003. She is presently the only full-time employee in the Recreation Department, which is located in the Town's Youth Center, one mile from Town Hall. There are approximately 35 seasonal staff members, including summer lifeguards, camp counselors, tennis, soccer, softball coordinator, etc. Buntin is responsible for recruiting, hiring, training and supervising the seasonal staff for the programs. None of the seasonal employees is a member of the S unit.

Buntin is responsible for the planning, administration, coordination and support of the Town's recreation programs. She reviews existing recreation programs and assesses their function, need, cost benefit and quality. She prepares the Department's budget, recruits coaches and sets sports league schedules. The Recreation Department employs no full-time clerical staff,<sup>60</sup> so Buntin creates and distributes fliers, schedules, press releases and other paperwork that is necessary for the administration of all Recreation Department programs.<sup>61</sup> Buntin answers the Department's telephone, doorbell, e-mails and questions from the public and delivers equipment to ball fields. In Buntin's absence, the Customer Service Center handles program registrations.

Buntin reports to Kelly, with whom she corresponds, via e-mail, several times a week. Buntin typically provides Kelly with updates regarding changes, complaints or suggestions, and equipment rental or acquisition matters.

As set forth in her job description, which was prepared in March of 2003, and corroborated by her own testimony, Buntin works under the policy direction of a seven-member Recreation Commission, who are appointed by the Mayor.<sup>62</sup> The Recreation Commission meets monthly and confers as needed. The Recreation Commission sets policies on such matters as program fees and ball field usage. Buntin can decide to drop or add recreation programs on her own, but she usually consults with the Recreation Commission before dropping a program that has been offered for many years. The Board will ask Buntin's opinion on other policy matters, but it ultimately sets all Recreation Department policy.<sup>63</sup>

The Recreation Department holds a number of bank accounts. Buntin turns over all monies received to the Town's Accounting Department. She has no check-writing authority.

57. As noted above, the Union has agreed that the position of Director of Finance and Administration is not included in its unit. Kelly did not testify in this proceeding.

58. Section 6-3(b) of the Charter states that the "[Director] of Municipal Finance shall serve, as the Mayor may from time to time specify, as the Town Treasurer, Town Collector, Treasurer-Collector or Town Accountant."

59. Before the Charter change, this position reported to the Town Manager. An organization chart prepared by Kelly reflects that the position of Director of Municipal Administration and Finance directly reports to the Mayor, and that the Treasurer/Collector reports to the Director of Municipal Administration and Finance.

60. Seasonal staff members occasionally perform clerical duties associated with their duties.

61. In Buntin's absence, the Customer Service Center handles program registrations. Buntin also attempts to get other part-time assistance and has emergency coverage lined up before she goes away. She periodically checks the office answering machine when she is away.

62. Section 6-10 of the Charter states:

There shall be a Board of Recreation Commissioners consisting of five (5) members and two (2) alternates appointed by the Mayor and approved by the Town Council, serving staggered three-year terms. The Board of Recreation Commissioners shall act in an advisory capacity to the Mayor. Any vacancy of a regular member of the Recreation Commission shall be filled by the appointment of an alternate member by the Mayor.

63. This finding, which is supported by the record evidence, has been added at the request of the SSEA.



The minimum qualifications for the position are an Associate's degree in a related field and two years of experience.

#### Opinion

As a preliminary matter, we treat the procedural posture of this case. As described above, on July 26, 2004, the Franklin Superior Court enjoined the Town from unilaterally withdrawing recognition from certain positions listed in the parties' collective bargaining agreement until the Commission determined the merits of this matter. Therefore, in deciding this case, we are constrained to view the Town's conduct prior to the injunction to determine whether the Town violated the Law, or would have violated it, but for the injunction. *City of Boston*, 8 MLC 1419, 1436 (1981) (where elimination of certain positions did not take place due to a court injunction, Commission treats transaction as if it were accomplished as planned). According to this precedent, the Town cannot defend this case on the grounds that it never withdrew recognition from the Union as the exclusive representative of the disputed positions. We thus turn to the merits of the charge of prohibited practice.

#### *Withdrawal of Recognition*

In general, where parties agree to be bound by a recognition clause of a collective bargaining agreement, it is unlawful for an employer to unilaterally withdraw recognition from any employees covered by that agreement and to cease applying the terms of that agreement. *City of Boston*, 12 MLC 1690, 1694 (1986); *Town of Wellesley*, 1 MLC 1589 (1975). However, the Commission may examine those agreements in subsequent proceedings, including unfair labor practice proceedings, if a party argues that the scope of the agreed-to unit is contrary to law or policy. *See, e.g., City of Quincy*, 26 MLC 190, 190 n.2 (2000), *citing City of Springfield*, 24 MLC 50, 54 (1998) (additional citations omitted). This is because neither the Commission nor the courts can compel an employer to continue applying the terms of a collective bargaining agreement if doing so would improperly extend collective bargaining rights to employees not covered by Chapter 150E. *City of Somerville v. Labor Relations Commission*, 53 Mass. App. Ct. 410, 412 (2001); *City of Chicopee*, 19 MLC 1765 (1993), *aff'd sub nom., City of Chicopee v. Labor Relations Commission*, 38 Mass. App. Ct. 1106 (1995); *Commonwealth of Massachusetts*, 6 MLC 1411 (1979). This is true even where the position has not changed in cases where, as here, the Commission has not previously had the opportunity to determine the unit placement of the positions. *City of Somerville*, 23 MLC at 256, 260, n. 11, *rev'd on other grounds, City of Somerville v. Labor Relations Commission*, 53 Mass. App. Ct. at 410. Specifically, the Commission has excluded positions that satisfy the managerial or confidential criteria found in Section 1 of the Law notwithstanding a party's prior agreement to include the positions in the unit. *Town of Montague*, 31 MLC 171, 178 (2005), *citing Fall River School Committee*, 27 MLC 37, 40 (2000).

Here, the record establishes that on February 2, 2004, Mayor Forgey announced her intention to cease recognizing S unit positions that the Town considered department heads, confidential employees and/or managerial employees. The parties discussed the Mayor's plan in general terms on several occasions from Feb-

ruary through June of 2004. However, the parties did not address including or excluding specific titles, in part due to the Union's refusal to engage in these discussions during the course of successor bargaining. Nonetheless, at no time did the Town retreat from its position that its actions were justified and authorized by the Town Charter and Chapter 150E. The correspondence between the parties, the parties' June 9 and June 17, 2004 meetings, and Mayor Forgey's meeting with employees in late June of 2004 clearly demonstrate that the Town intended to withdraw recognition from the positions listed in Mayor Forgey's letters of February 2, 2004 and March 18, 2004 and, but for the injunction issued in July of 2005, would have done so.

The record also establishes that since the Town voluntarily recognized the Union on November 19, 1992, it has negotiated and implemented four collective bargaining agreements with the Union, the last of which contained a recognition clause containing each of the titles that the Town seeks to exclude from the S unit. Under the cases set forth above, had the Town not been enjoined from doing so, it would have violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by withdrawing recognition from titles it had previously recognized in its Agreement, unless those titles are otherwise excluded from the Law's protection as a matter of law or public policy.

In so holding, we reject the Town's argument that the Commission has no jurisdiction to decide this case, because the bargaining relationship between the parties was not "commenced or continued under Chapter 150E." However, the Town does not dispute the following jurisdictional elements: 1) the Union is an employee organization within the meaning of Section 1 of the Law; 2) the Town is an employer within the meaning of Section 1 of the Law; and 3) in 1992 and in subsequent collective bargaining agreements, it clearly and unequivocally recognized the Union as the exclusive representative of all S-schedule employees. Further, the Town's recognition notice specifically states its intention to recognize the Union pursuant to Commission rules. Moreover, it is for the Commission, not the parties, to determine both the lawfulness of the Town's actions, *see Sheriff of Bristol County v. Labor Relations Commission*, 62 Mass. App. Ct. 665 (2004) (Commission has jurisdiction under Chapter 150E to hear prohibited practice cases and to issue affirmative orders), and the appropriateness of the parties' bargaining unit. *See Jordan Marsh Co. v. Labor Relations Commission*, 312 Mass. 597 (1942) (ordinarily, representation issues are within the Commission's jurisdiction). The Commission therefore has jurisdiction over this matter.

We also reject the Town's argument that it is entitled to withdraw recognition from the disputed positions due to the passage of Section 3-4 of the Charter, which discusses removal or suspension of department heads. Section 7(d) of the Law subjugates certain enumerated statutes, including municipal ordinances and bylaws, to conflicting provisions of collective bargaining agreements. The Charter is not enumerated in Section 7(d) of the Law and, thus, is arguably not subject to any conflicting provision of a collective bargaining agreement. *See School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 565, n.6 (1988) (assuming, for purposes of discussion, that the Legislature did not intend the

reference to municipal ordinances and bylaws to include city charters). However, Section 9-4 of Charter specifically provides that all contracts entered into by the Town before the adoption of the Charter remain enforceable and unaffected by the Charter. There is no evidence that this provision does not apply to the parties' Agreement. Consequently, the Town's argument that it was completely free to disregard its obligations under the Agreement is without merit. In any event, contrary to the Town's argument, there is not a direct conflict between the terms of the Charter and the parties' Agreement. Rather, Section 3-4 of the Charter vests the Mayor with the sole authority to remove or suspend department heads and Town officers. It does not authorize the Mayor to withdraw recognition from the positions held by employees nor does it prevent the Town from bargaining over their terms and conditions of employment. Nor does the Charter prohibit the Mayor from recognizing and bargaining about the terms and conditions of employment of other employees that the Town seeks to remove from the bargaining unit that the Town does not claim are department heads (e.g. the PDMA).

In the absence of a direct conflict between the Charter and Chapter 150E, the Commission must attempt to construe Chapter 150E and the Charter as a "harmonious whole." *See, e.g., Town of Ludlow*, 17 MLC 1191, 1197 (1990), *citing Dedham v. Labor Relations Commission*, 365 Mass. 392, 402 (1974). In the case before us, that means construing Section 3-4 of the Charter to refer only to those department heads that are statutorily exempt from coverage under Chapter 150E. *See generally, Town of Agawam*, 13 MLC 1364 (1986), *citing Waltham School Committee*, 3 MLC 1242, 1246, n.2 (1976) (the Commission interprets the titles listed in Section 1 as examples of managerial classifications, rather than as positions to be excluded without regard to the exercise of managerial authority).<sup>64</sup> The Town's argument regarding Section 3-4 of the Charter therefore lacks merit.

The Town also argues that it did not unilaterally withdraw recognition from the disputed positions, because the parties bargained to impasse over the unit composition issue and/or the Union refused to bargain. However, neither of the theories advanced by the Town takes into account the Mayor's statements and letters from February 2, 2004 until June 24, 2004, which presented the Union with a *fait accompli* with respect to the Town's plan to cease recognizing the disputed positions as part of the S unit. Consequently, the Town's arguments are unavailing. *See Town of Hudson*, 25 MLC 143, 148 (1999).

However, we also reject the Union's argument that the various sub-sections of Article 35 of the Agreement preclude the Town from withdrawing recognition from *any* previously-recognized positions. As previously noted, the scope and definition of an appropriate bargaining unit is a matter that is committed by Law to Commission discretion, and the Commission is free to reject those agreements, notwithstanding the parties' prior agreement to the contrary. *Id.* at 190, n. 2. Consequently, we turn to analyze the po-

sitions that are the subject of the Town's CAS petition to determine whether: (a) the Town violated Section 10(a)(5) of the Law by withdrawing recognition from those positions; and (b) those positions should otherwise be excluded from the Union's bargaining unit under our traditional unit clarification analysis.

#### *Disputed Positions*

The Town wishes to exclude fourteen positions from the S unit on the grounds that the employees holding those positions are department heads, supervisors, managers, confidential and/or professional employees. We first treat the Town's arguments that certain employees should be excluded from the bargaining unit based on their department head status alone, without regard to the duties they actually perform, and that the Commission should exclude all professional employees from the unit because they did not have the opportunity to vote in a separate election. We reject both arguments.

#### *Department Heads*

Section 1 of the Law defines an employee as:

Any person in the executive or judicial branch of a government unit employed by a public employer except elected officials, appointed officials, members of any board or commission, representatives of any public employer, including the heads, directors and executive and administrative officers of departments and agencies of any public employer, and other managerial employees or confidential employees . . . . Employees shall be designated as managerial employees 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.

The Town argues that the legislative history of Chapter 150E demonstrates that municipal department heads were purposefully and specifically excluded from the definition of employee and, notwithstanding Commission precedent to the contrary, should be excluded as matter of Law, without regard to specific job duties. In support of this argument, the Town draws the Commission's attention to a legislative amendment adopted by the State Senate on September 19, 1973, which sought to exclude department heads employed by the Commonwealth from the statutory definition of employee under Chapter 150E, but did not similarly seek to exclude department heads of municipal employers. The legislative history shows that the House opposed that amendment and, instead, proposed an amendment that excluded department heads of "any employer" using language that is in essence the same as that in effect today. The House amendment passed, and the Town reasons that this legislative history demonstrates a legislative intent to exclude department heads, not merely as a subset of managerial employees, but as a separate and independent title. The Town also argues, applying various principles of statutory construction, that

64. As discussed below, the Town acknowledges this precedent, but urges the Commission to reconsider it. The Commission declines to do so for the reasons forth in our discussion of department heads in the next section of this decision

if the Legislature had intended the managerial employee test in Section 1 of the Law to apply to department heads, it would have omitted the words “department head” and merely used the phrase “managerial employee” throughout the definition.

As the Town acknowledges however, for over twenty-five years, the Commission, with judicial approval and without further action from the Legislature, has taken a far more restrictive view of the categories of employees set forth in Section 1 of the Law and excluded them from coverage only if they otherwise meet the criteria for managerial employee. *Wellesley School Committee*, 1 MLC 1389, 1403 (1975), *aff’d sub nom.*, *School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112 (1978) (department heads who did not meet the statutory definition of managerial employees are not excluded from the Law’s coverage); *City of Chicopee*, 19 MLC at 1767-1768 (only “appointed officials” who are managerial employees are excluded from coverage under the Law); *See also*, *Town of Tisbury*, 30 MLC 77, 82 (2003), *citing City of Chicopee*, 19 MLC at 1767-1768 (further citations omitted) (same).

The Commission’s decisions in this area are rooted both in the plain language of the statute and important policy considerations. In *Town of Agawam*, 13 MLC at 1367, the Commission parsed Section 1 as follows:

[B]y the Legislature’s use of the word “other” in conjunction with “managerial employees” in Section 1, the statute defines “representatives” of the public employer to be coextensive with the term “managerial employee.” By specifying that “the heads . . . of departments . . . of any public employer, and other managerial employees . . . shall be exempt from collective bargaining,” the plain language of the statute requires that the “heads . . . of departments” be considered one sub-group of “managerial employees.” Thus, not only “heads . . . of departments” but also other managerial employees are to be excluded. If the head of the department is not a “managerial employee” however the statute does not require his or her exclusion from coverage of the Law. [Emphasis in original.]

*Id.*, quoting *Waltham School Committee*, 3 MLC at 1242.

As a matter of policy, the Commission has also held that it cannot endorse excluding all department heads from the Law’s coverage on the basis of their title alone, because interpreting Section 1 that way would “encourage employers simply to label employees as ‘department heads’ in order to exclude them from the coverage of the Law.” *Town of Agawam*, 13 MLC at 1368. As is evident from the varying job duties of the disputed positions set forth below, there is no single factor common to department heads as a group that would warrant their *per se* exclusion from the Union’s bargaining unit, and we decline to do so.

#### *Professional Employees*

The Town argues that the Town Accountant, Chief Assessor, Building Inspector, Library Director, DPW Superintendent, DPW

Water Facilities Superintendent, Health Director, Library Director and Treasurer/Collector should be excluded from the bargaining unit, because they are professional employees who did not have the opportunity to vote in a separate election.<sup>65</sup> However, an employer lacks standing to raise the issue of the professional status of employees in a unit clarification petition, because the statutory right of professionals to decide whether they wish to be included in a bargaining unit of both professional and nonprofessional employees inures to the benefit of the professional employee, not the public employer or the union that seeks to represent those employees. *Town of Tisbury*, 30 MLC at 83. The Town argues, however, that the Charter establishes it as a new employer, which has standing to raise this issue as part of its core managerial rights to organize the structure of its government. Even assuming, without deciding, that the new Charter changed the identity of the public employer, this does not otherwise affect our analysis under *Town of Tisbury*, *supra*. Accordingly, we turn to our analysis of the specific job titles at issue.

#### *1. Town Accountant*

The Town contends this position should be excluded because it is confidential, as well as managerial, and because it supervises other SSEA positions. However, we do not find the Town Accountant to be a managerial employee, because his duties and responsibilities do not satisfy any of the three statutory criteria referenced above. *Town of Manchester-by-the-Sea*, 24 MLC 76, 81 (1988). There is no evidence that he formulates proposals or other policy matters for the Town, or that he has a significant voice in determining collective bargaining strategy or conditions for settlement. *See City of Boston*, 19 MLC 1050, 1063 (1992); *City of Quincy*, 13 MLC at 1440 (overturning hearing officer’s conclusion that assistant comptroller was a managerial employee, where assistant comptroller participated in management meetings, but there was no evidence that his input had a particular impact on the mission of the public enterprise and/or that the assistant comptroller actually formulated proposals). Moreover, because Kociela reports to Kelly, his decisions are screened by another layer of administration before implementation. He therefore does not exercise independent judgment of the type of the Commission has deemed necessary to meet the third component of the statutory test. *See Town of Manchester-by-the-Sea*, 24 MLC at 81 (independent judgment requires that an employee exercise discretion without consultation or approval). The fact that the Town Accountant does not report directly to the executive or legislative branch of government also distinguishes this title from other accountants who have been designated managerial employees, despite a somewhat similar level of involvement in collective bargaining. *See, e.g., id.* at 76; *Town of Agawam*, 13 MLC at 1354.<sup>66</sup> *Compare Town of Easton*, 31 MLC 132, 145 (2005) (town accountant who was a member of town’s bargaining team and assisted to a substantial degree in conducting collective bargaining was a managerial employee).

65. Section 3 of the Law states in part that “no unit shall include both professional and nonprofessional employees unless a majority of such professional employees votes for inclusion in such unit.”

66. Because we have determined that Kociela should be excluded from the unit on the grounds that he is a confidential employee, we do not reach the issue of whether he supervises the Assistant Town Accountant. We note however that the Assistant Town Accountant position has been vacant for over two years and, therefore, there is no evidence in the record regarding the actual supervisory duties of this position.

We next turn to consider whether the Town Accountant is a confidential employee. Section 1 of the Law defines the “confidential” exclusion 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. *Town of Chelmsford*, 27 MLC 41, 43 (2000), *citing Town of Medway*, 22 MLC 1261, 1269 (1995). This exclusion has been narrowly interpreted to exclude as few employees as possible, while not unduly hindering the employer’s operations. *Silver Lake Regional School Committee*, 1 MLC 1240, 1243 (1975). Regular exposure to confidential material directly related to labor relations policy or other equally sensitive policy information while directly assisting a person excluded from the Law’s coverage is grounds for finding an employee confidential. *Town of Medway*, 22 MLC at 1269, *citing Framingham School Committee*, 17 MLC 1233 (1990); *Pittsfield School Committee*, 17 MLC 1369 (1990).

Here, we conclude that the Town Accountant is a confidential employee for two reasons.<sup>67</sup> First, Kociela is one of only five other Town employees that attend the Mayor’s bi-weekly management meetings. Collective bargaining matters are routinely discussed during these meetings. Second, Kociela costs out collective bargaining proposals and acts as a consultant to the Human Resources Director during collective bargaining. There is no dispute that the Human Resources Director is a managerial employee. Moreover, Kociela reports to Kelly, whom the parties have agreed to exclude from the unit because she is managerial. Consequently, the Town Accountant meets the confidential criteria set forth in *Town of Medway*, 22 MLC at 1269, and is excluded from the bargaining unit on that basis. *See also City of Lawrence*, 25 MLC 167 (1999) (budget analyst who costed out collective bargaining proposals, attended meetings where those proposals were discussed and had access to other confidential labor relations information deemed confidential); *City of Quincy*, 13 MLC at 1440 (assistant comptroller who costed out bargaining proposals deemed confidential and excluded from unit). *Compare Town of Plainville*, 18 MLC 1001 (1991) (assistant town accountant held non-confidential where he did not participate in collective bargaining or attend meetings where confidential fiscal or labor relations matters were discussed). Accordingly, the Town did not violate Section 10(a)(5) of the Law when it withdrew recognition from this position.

### 2. Building Inspector

The Town asserts that this position should be excluded as managerial and supervisory. We disagree. Although this is a highly technical position with responsibility for enforcing various laws and

building codes, these types of duties do not render an employee managerial. As the Commission stated in *Town of Agawam*:

While the[se] enforcement powers may very well affect the citizens or buildings of [the town], they have no more managerial responsibility than a police officer who is often called upon to exercise substantial judgment and discretion in enforcing the law. Similarly, the independent judgment of a firefighter can also affect the citizens and buildings of [the town]. Neither police officers nor firefighters are thereby considered managerial.

13 MLC at 170, *citing Town of Wellfleet*, 11 MLC 1238 (1984), *further citing, Town of Dedham*, 4 MLC 1347 (1977).

The evidence further reflects that the incumbent in this position makes no policy, has no responsibility for collective bargaining, and does not supervise any members of the Union’s bargaining unit. Thus, the Building Inspector is neither managerial nor supervisory and should remain in the S unit. We therefore conclude that the Town violated Section 10(a)(5) of the Law by withdrawing recognition from this position.

### 3. COA Director

The Town argues that this position should be excluded as managerial, and because it supervises a bargaining unit position. We agree that this position is managerial based on the significant discretion that the COA Director exercises in creating, implementing and enforcing the Town’s senior services programs. Unlike the COA director whom the Commission found to be non-managerial in *Town of Agawam*, 13 MLC at 1364, Stowe reports directly to the Mayor and has the independent authority to plan, develop and administer social, recreational and educational programs. Stowe also identifies and applies for grant funding, and identifies and assesses the needs of the Town’s senior population generally. Stowe acknowledges that he works under the policy direction of both the Mayor and the Council on Aging. However, the evidence demonstrates that he does more than just administer the Town’s elder services programs - he assesses the needs of the population and creates programs in response to those needs. Moreover, he does not need the approval of the COA to implement new programs. The COA Director also prepares the Town’s budget, and recruits, hires and supervises COA employees. While Stowe has worked with Human Resources in the hiring process, final hiring decisions rest with him. In this respect, Stowe exercises duties similar to those of the library director in *Town of Montague*, 31 MLC at 177-178, whom the Commission excluded from a unit of supervisory employees on the grounds that she was a managerial employee. We follow this precedent and hold that Stowe is a managerial employee within the meaning of Section 1 of the Law. Accordingly, we find that the Town did not violate Section 10(a)(5) of the Law when it withdrew recognition from this position.

### 4. DPW Superintendent

Bean easily meets the first and second determinants of managerial status set forth above. The record demonstrates that he is solely re-

67. The Town did not list the Town Accountant as a confidential position in its exhibit of disputed positions. However, because the Town argues in its post-hearing brief that that the position is confidential, we do not consider the Town to have stip-

ulated that Kociela is not a confidential employee based on what appears to be an inadvertent omission.

sponsible for creating the DPW's policies, and has drafted, reviewed and implemented regulations and bylaws for the various DPW divisions. He is a member of the Mayor's Senior Management team, prepares the DPW budget and presents that budget directly to the Town Council. He oversees all aspects of hiring and firing in his department. He also attends W unit collective bargaining negotiations. Moreover, unlike many of the other positions at issue here, and even the DPW superintendent in *Town of Dartmouth*, 29 MLC 204, 207 (2003), whom the Commission held to be managerial, Bean does not share any policy-making authority with a board or other elected or appointed body. Based on these record facts, we conclude that the DPW Superintendent is a managerial employee within the meaning of Section 1 of the Law. The Town therefore did not violate Section 10(a)(5) of the Law by withdrawing recognition from this position.

#### 5. DPW Field Superintendent

The Town contends that this employee supervises other positions in the SSEA's bargaining unit and should be excluded on that basis alone. We disagree.

Section 3 of the Law requires the Commission to determine appropriate bargaining units that are consistent with the purpose of providing for stable and continuing labor relations while giving due regard to the following statutory considerations: 1) community of interest; 2) efficiency of operations and effective dealings; and 3) safeguarding the rights of employees to effective representation. *City of Everett*, 27 MLC 147, 150-151 (2001). Applying the criteria set forth in Section 3 of the Law, the Commission generally establishes separate bargaining units for supervisory employees and the employees they supervise. *Sheriff of Worcester County*, 30 MLC 132, 137 (2004) (additional citations omitted). This policy is rooted in the judgment that individuals who possess significant supervisory authority owe their allegiance to their employer, particularly in the areas of employee discipline and productivity. *Town of Bolton*, 25 MLC 62, 67 (1998). Supervisors and the employees they direct have different obligations to the employer in personnel and policy matters, therefore to retain them in the same bargaining unit would likely lead to a conflict of interest within the bargaining unit. *City of Chicopee*, 1 MLC 1195, 1197-1198 (1974). To determine whether an employee is a supervisor, the Commission distinguishes between a true supervisor and an employee who possesses more limited supervisory authority. "A true supervisor has independent authority to make, or the power to effectively recommend, personnel decisions such as whether to hire, transfer, suspend, promote, or discharge employees or to resolve grievances." *Greater New Bedford Regional Vocational School Committee*, 15 MLC 1040, 1045 (1988).

Setting aside the issue of whether removing this position from the bargaining unit is appropriate where there is no evidence that it has changed since the Town first recognized the unit, see *Sheriff of Worcester County*, 30 MLC at 137-138 and *Town of Provincetown*, 31 MLC 55, 59-60 (2004), there is no evidence that Garanin actually supervises any bargaining unit employees. While the record reflects that Sanders, the Operations Supervisor, resumed reporting to Garanin at some point during the hearing of this matter, the record contains no evidence of the nature of the re-

lationship between the two employees that is sufficient to enable the Commission to determine whether Garanin is a true supervisor under the criteria set forth above. In fact, despite the change in reporting authority, Sanders continues to meet with Bean on a weekly basis. Consequently, we decline to exclude Garanin from the unit as a supervisor and hold that the Town violated Section 10(a)(5) of the Law by withdrawing recognition from this title. See *Sheriff of Worcester County*, 30 MLC at 137 and cases cited therein (outcome sought by a unit clarification petition must be clearly supported by an apparent deficiency in the scope of the existing unit).

#### 6. DPW Water Facilities Superintendent

The Town contends that Shields should be excluded from the S unit, because she is a managerial employee who also supervises other positions in the bargaining unit. The evidence does not support this contention.

Like the Building Inspector, Shields's position is highly technical, as she is responsible for the enforcement of federal, state and local water use statutes, regulations and bylaws. However, there is no evidence that Shields makes policy in those areas, and even though she has drafted some regulations, those drafts, at all times, remained subject to Bean's final approval. Although two S unit employees report to Shields, there is no evidence that she has the authority to make or recommend hiring, transferring, or disciplinary decisions about those employees. See *Greater New Bedford Regional Vocational School Committee*, 15 MLC at 1045. Moreover, Bean sets the personnel policies for the Water Facilities Department and retains final hiring authority for all DPW positions. Although Helmus seeks Shields's input in collective bargaining negotiations, the record does not reflect that Shields has access to any Town proposals before bargaining unit members do, or that she otherwise participates in collective bargaining. Accordingly, we decline to exclude Shields from the S unit on the grounds that she is a managerial or supervisory employee and hold that the Town violated Section 10(a)(5) of the Law by withdrawing recognition from this position.

#### 7. Fire Department Confidential Secretary

The Town seeks to exclude the Fire Department Confidential Secretary position as confidential. We decline to do so.

Lively performs a variety of administrative and clerical duties in the Fire Department, including monitoring the amount of leave and wages that firefighters are entitled to under the terms of the F unit collective bargaining agreement. However, the evidence reflects that Lively does not have significant access or exposure to confidential labor relations information, or that she types or otherwise has advance knowledge of the Fire Chief's collective bargaining proposals. Consequently, we find that this position is not confidential within the meaning of the Law. Compare *Fall River School Committee*, 27 MLC at 40, citing *Silver Lake Regional School Committee*, 1 MLC at 1243 (excluding secretary who typed bargaining unit proposals as confidential employee). Thus, the Town violated Section 10(a)(5) of the Law by withdrawing recognition from this position.

#### 8. Health Director

The Town claims that this position should be excluded from the unit because it is managerial and supervisory. We do not agree.

Like Shields and Garanin, Hebert is responsible for enforcing a technical statute or regulation, here the state Health Code. Although Hebert exercises discretion in determining whether to issue lists of violations, condemn property or take violators to court, this is the same type of responsibility exercised by police officers, who, as noted above, are not managerial employees. *See Town of Agawam*, 13 MLC at 170. Indeed, her enforcement and inspection duties are substantially the same as those of the Assistant Health Director, whose S unit status the Town does not contest.

Furthermore, there is no evidence that Hebert makes policy, drafts or revises regulations, or educates the public regarding public health issues. Finally, there is no evidence, and the Town does not contend, that the Health Director assists to a substantial degree in the preparation for, or conduct of, collective bargaining on behalf of the Town. As a result, we decline to hold that Hebert is a managerial employee within the meaning of Section 1 of the Law. *See Town of Tisbury*, 30 MLC at 82 (health agent that enforced state and local public health laws, responded to inquiries and complaints, and investigated and reported cases of diseases and dangers to public health was not a managerial employee, where there was no evidence that the incumbent played a significant role in policy formulation or had any responsibilities for negotiating or enforcing the collective bargaining agreement). *Compare Town of Montague*, 31 MLC at 175-177 (health director who drafted and revised local health regulations with little or no revision from town's board of health was a managerial employee).

The Town also argues that this position is supervisory. However, there is no evidence that Hebert exercises true supervisory authority over the Assistant Health Director. Rather, the evidence shows that Hebert oversees Wasiuk's work generally but does not set or oversee his schedule. The record does not show that Hebert has hired, fired, or disciplined Wasiuk. If she discovers problems with his work that are not resolved by discussing them with him, she addresses the issue with the Board of Health. Based on the record before us, we conclude that Hebert is neither managerial nor supervisory and should remain in the S unit. We further conclude that the Town violated Section 10(a)(5) of the Law by unilaterally withdrawing recognition from this title.

#### 9. Library Director

The Town argues that the Library Director should be excluded from the S unit, because the incumbent is a managerial employee. The record evidence supports this assertion.

As Library Director, Ryan has significant responsibility for running the entire library, including the content of its collection, policy matters, budget matters and most lower-level personnel matters. The Charter specifies that the Board of Trustees sets policies

that affect the Library's internal operations. However, like the library directors discussed in *Town of Montague*, 31 MLC at 173-175, *Town of Athol*, 32 MLC 50, 51 (2005), and *Town of Manchester-by-the-Sea*, 24 MLC at 79-80, the Library Director provides input to the Board of Trustees when making those policies, and the Board has never modified or rejected any of Ryan's proposed policies. Moreover, Ryan's budget and policy recommendations are not screened through another layer of management before she presents them to the Board of Trustees. *See Town of Athol*, 32 MLC at 53, *citing Town of Manchester-by-the-Sea*, 24 MLC at 82. Her input is more than merely advisory or informational in nature. Thus, the evidence presented justifies excluding the Library Director from the Union's bargaining unit as a managerial employee. Accordingly, the Town did not violate Section 10(a)(5) of the Law when it withdrew recognition from this position.

#### 10. PDMA

The Town argues that this position is confidential. The evidence shows that the incumbent in this position, in addition to her many other duties involving the uniformed police force, sits in collective bargaining negotiations when the police chief cannot be present and costs out bargaining unit proposals for Helmus. These facts lead us to conclude that the Police Chief, a managerial employee, has a legitimate expectation of confidentiality in his routine and recurrent dealing with the PDMA, and that this position should be excluded from the bargaining unit as a confidential employee. *City of Quincy*, 13 MLC at 1440. The Town therefore did not violate Section 10(a)(5) of the Law when it withdrew recognition from this position.

#### 11. Town Clerk

The Town argues that Winseck, as a legislative employee, is excluded from the S unit as a matter of Law.<sup>68</sup> It also argues that Winseck is a managerial employee and should be excluded, because she supervises other employees in the S unit.

The Commission traditionally has examined a variety of factors in determining employee status questions. The fundamental question is to establish who exercises the overall right to control the employee at issue. The indicia of control include the powers of appointment and assignment, the authority to establish work standards, and the exercise of supervisory authority. *Suffolk County*, 5 MLC 1010, 1013 (1978), *citing Massachusetts Probation Association v. Commissioner of Administration*, 370 Mass. 651, 657-663 (1976). *See also City of Somerville*, 53 Mass. App. Ct. at 412, *citing* 1 Rothstein, Craver, Schroeder, & Shoben, *Employment Law*, §1.28 at 120 (2d ed. 1999) (to ascertain what branch of government is the employer, factors to consider include method of hiring, basis of compensation, power of dismissal, and power of control).

Here, the Town Council clearly has the authority to appoint the Town Clerk under Charter Section 2-8(b). We also find that it has the right to remove and suspend the Town Clerk under Section

68. Section 1 of the Law defines covered employees as "any person in the executive or judicial branch of government." The Commission has interpreted this to mean that legislative employees are excluded from coverage under the Law. *City of Lawrence*, 13 MLC 1632, 1640 (1987).

2-8(d) of the Charter, which states that “any person elected by the Town Council may be removed or suspended by the Town Council by the use of procedures substantially the same as those contained in section 3-4(b).” Section 3-4(b) states in part, “Unless some other procedure is specified in a collective bargaining agreement . . . a department head may suspend or remove any assistant, subordinate or other employee of the agency for which such person is responsible in accordance with the procedures established for suspension and removal in the Personnel Bylaw.”

The Union contends that the reference to Section 3-4(b) demonstrates that the right to remove the Town Clerk is subject to the collective bargaining agreement. However, on its face, Section 2-8(d) merely specifies the procedures that the Town Council must employ to remove or suspend a person it has selected. This provision does not strip the Town Council of its authority under Section 2-8(d) of the Charter to exercise this power. Consequently, we conclude that the Town Council has the right both to appoint and to remove or suspend the Town Clerk.

We next must determine which branch of government has the right of control over the Town Clerk, where she spends 95% of her time performing non-legislative duties under the daily oversight of the executive branch, but the Town Council retains the right to appoint, remove and suspend her. In the *Somerville* decision, the Appeals Court notably did not find the actual duties performed by the clerk dispositive where, as here, they consisted of both legislative and executive duties. *Id.* at 413. Rather, the Court found that the right of control was “implicit as a practical matter in the facts that the clerk holds . . . office only for a relatively short term, and that the power of reappointment as well as a power to remove remain in the [legislative branch].” Because the same right of control is implicit in the Town Council under Sections 2-8(b) and (d) of the Charter, as discussed above, we find that ultimate control over the Town Clerk rests with the legislative branch of government.

Based on the indicia of control contained in the record, we conclude that the Town Clerk is a legislative employee, and that the Town did not violate Section 10(a)(5) of the Law when it withdrew recognition from this position. Having reached this conclusion, we need not address the Town’s alternative arguments that Winseck is a managerial or supervisory employee.

#### 12. Treasurer/Collector

The Town contends that this position is managerial and supervisory. However, there is insufficient information in the record to establish that the Treasurer/Collector exercises significant policy-making authority or is involved in the collective bargaining process. Nor is their evidence, and the Town does not contend that the Treasurer/Collector has substantial responsibilities 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. Although the job description states that this position has responsibility for borrowing, investing and managing Town funds, and that the incum-

bent appoints, oversees, and sets policy guidelines for the Deputy Collector of Taxes, the parties did not stipulate to the accuracy of the job description, and there was no testimony from Kelly regarding the actual job duties of this position.

Nevertheless, we cannot ignore the fact that, as of the date of the hearing, Kelly was the Treasurer/Collector as well as the Director of Municipal Finance and Administration. As reflected above, the Union has agreed not to litigate the unit placement of the Director of Municipal Finance and Administration outside of the S unit.<sup>69</sup> Therefore, even though the present record does not establish that the Treasurer/Collector is a managerial or supervisory position, placing Kelly in the S unit for purposes of one title, but excluding her for another, would create an unworkable situation, and we decline to do so on that basis. When and if Kelly vacates the position, it should revert to the S unit. *See Town of Easton*, 31 MLC at 145 (treasurer/collector whose duties included initiating tax liens, invoking remedies for nonpayment of taxes, preparing borrowing of authorized debt, selling bonds and notes and managing cash flow, including investment of cash flow within legal limits, not a managerial employee and was appropriately included in a unit of department heads and supervisors). Based on the unique circumstances presented here, we hold that the Town did not violate Section 10(a)(5) of the Law by withdrawing recognition from the Treasurer/Collector position, while Kelly was the incumbent in that position.

#### 13. Recreation Director

The Town contends that Buntin should be excluded as a managerial employee. We do not agree.

Like the COA Director, Buntin creates, plans, and administers the Town’s recreation programs and budget. However, the COA Director reports directly to Mayor Forgey, with no intervening level of management. By contrast, the Recreation Director reports to Kelly, and corresponds with her several times a week regarding the department’s daily operations. The evidence also establishes that ultimate policy-making authority rests with the Recreation Board. Thus, this position is analogous to that of the recreation director in *Town of Agawam*, 12 MLC at 1114, who reported to the town manager and whose duties were not found to rise to the level of substantial policy formulation. Moreover, because Buntin does not assist to a substantial degree in the preparation for or the conduct of collective bargaining, we conclude that the Recreation Director is not a managerial employee. Thus, the Town violated Section 10(a)(5) of the Law by withdrawing recognition from this position.

#### 14. Chief Assessor

The Town asserts that this position should be excluded from the S unit, because it is managerial and supervisory. However, the evidence fails to show that Murphy participates to a substantial degree in formulating policy. Rather, the position’s job description states that the Director of Municipal Finance and Administration

69. In its post-hearing brief, the Union also does not contest that the Director of Municipal Finance and Administration is managerial.

sets the policy guidelines for the Assessor's Office, and the Chief Assessor works under the broad policy direction of the Mayor. Murphy could not identify any policies in the Assessor's Office and consults with Kelly whenever she is uncertain about the scope and extent of her job duties. Although Murphy sits on the Board of Assessors, she merely informs the Board about what is going on in her department and must consult with them before making any important decisions. Further, there is no evidence that she is involved in collective bargaining or exercises any independent judgment. Accordingly, we decline to find that she is a managerial employee. *See City of Amesbury*, 25 MLC 7, 8 (1998) (chief assessor that had no policy-making or labor relations responsibilities included in proposed supervisory bargaining unit).

The Town also claims that Murphy is a supervisor. The evidence shows Murphy has effectively recommended that a probationary employee be fired. Although the record does not reflect that the probationary employee was a member of the S unit, the fact that Murphy effectively recommended that this employee be terminated demonstrates that Murphy has true supervisory authority. *Greater New Bedford Regional School Committee*, 15 MLC at 1045. As a result, we ordinarily would decline to place Murphy in the same unit with the employees she supervises. *Sheriff of Worcester County*, 30 MLC at 137. However, in this case, there is no other appropriate bargaining unit in which to place Murphy. The Commission traditionally has been reluctant to create one-person bargaining units where there is a larger, appropriate unit. *See Barnstable County*, 26 MLC 183, 188 (2000), *citing Freetown-Lakeville Regional School District*, 11 MLC 1508, 1517, n.6 (1985); *Chatham School Committee*, 6 MLC 1042 (1975). Therefore, because the Chief Assessor shares a community of interest with other employees in the S unit in terms of work location, supervision received and administrative duties exercised, we conclude that the Chief Assessor should remain in the S unit. We further conclude that the Town violated Section 10(a)(5) of the Law when it withdrew recognition from this position.

#### Conclusion

Based on the foregoing, we conclude that the following positions are managerial, confidential, and/or legislative, and that the Town did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by ceasing to recognize these titles as part of the existing S bargaining unit.

Town Accountant - Confidential  
 DPW Superintendent - Managerial  
 COA Director - Managerial  
 Library Director - Managerial  
 PDMA - Confidential  
 Town Clerk - Legislative

We also hold that the Town did not violate the Law by withdrawing recognition from the position of Treasurer/Collector, while the incumbent in that position also holds the title of Director of Municipal Finance and Administration. We do not otherwise conclude that the Treasurer/Collector position falls within the managerial,

confidential or legislative exclusions set forth in Section 1 of the Law.

We further conclude that the remaining disputed positions are appropriately included in the S unit. Had the Town not been enjoined from ceasing to apply the terms and conditions of the Agreement to these employees, it would have violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

#### Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Town of Greenfield shall:

#### 1. Cease and desist from:

- a. Failing or refusing to bargain in good faith with the Union by ceasing to recognize the Salary Schedule Employees Association (Union) as the exclusive collective bargaining representative of the following positions: Building Inspector, DPW Field Superintendent, DPW Water Facilities Superintendent, Fire Department Secretary, Health Director, Recreation Director, and Chief Assessor.
- b. Failing or refusing to apply the terms of the collective bargaining agreement between the parties to the positions set forth in paragraph 1(a), above.
- c. In any like or similar manner, interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under the Law.

#### 2. Take the following affirmative action that will effectuate the purposes of the Law:

- a. Bargain in good faith with the Union about the terms and conditions of employment for the positions set forth in paragraph 1(a), above.
- b. Apply the terms of the parties' collective bargaining agreement to the positions set forth in paragraph 1(a), above.
- c. Immediately post in all conspicuous places where employees usually congregate and where notices to employees are customarily posted, and leave posted for not less than thirty consecutive (30) days, the attached Notice to Employees; and
- d. Notify the Commission in writing within ten (10) days of receipt of this Decision and Order of the steps taken to comply with it.

WHEREFORE, based on the foregoing, it is hereby ordered that the S unit be clarified to exclude the Town Accountant, the DPW Superintendent, the Council on Aging Director, the Library Director, the Police Department Management Assistant and the Town Clerk. The Treasurer/Collector shall be excluded from the S unit for only so long as the incumbent in that position remains the Director of Municipal Finance and Administration. When this ceases to occur, the position of Treasurer/Collector shall revert to the S unit.

SO ORDERED.

#### APPENDIX I

List of Positions Included in Parties' Agreement as "Memorandum of Understanding # 1":

Accountant



Activities/Associate Director COA  
 Animal Control Officer  
 Assessor  
 Assistant Accountant  
 Assistant Assessor  
 Assistant Collector  
 Assistant Town Clerk  
 Assistant Treasurer  
 BOS Administrative Assistant  
 Building Inspector  
 Community Development Administrator  
 Community Economic Development Specialist  
 Planning and Community Development Director  
 COA Secretary/Bookkeeper  
 COA Director  
 COA Outreach Coordinator  
 COA Wellness Coordinator  
 DPW Ass't Engineer  
 DPW Engineer  
 DPW Junior Engineer  
 DPW Water Facilities Foreman  
 DPW Water Facilities Lab Tech  
 DPW Ass't Field Supervisor  
 DPW Field Supervisor  
 DPW Water Facilities Superintendent  
 DPW Chief of Survey  
 DPW Vehicle Maintenance Foreman  
 DPW Highway Foreman  
 DPW Management Assistant  
 DPW Superintendent  
 Management Assistant-Fire Department  
 Health Director  
 Health (Public) Sanitarian  
 HR Administrative Assistant  
 INS/FID Supervisor  
 Management Assistant-Police Dep't  
 Land Use/GIS Planner  
 Library Director  
 MIS Director  
 MIS Network Technician/Analyst  
 Permits Manager/Planner  
 Recreation Director

Teen Center Coordinator  
 Town Clerk  
 Town Council Admin. Ass't  
 Town Mgr./BOS Exec. Ass't  
 Sealer of Weights and Measures  
 Treasurer/Collector  
 Veterans/Purchasing Agent

**NOTICE TO EMPLOYEES POSTED BY ORDER OF THE  
MASSACHUSETTS LABOR RELATIONS COMMISSION**

**AN AGENCY OF THE COMMONWEALTH OF  
MASSACHUSETTS**

The Massachusetts Labor Relations Commission has determined that the Town of Greenfield (Town) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by unlawfully withdrawing recognition of the Salary Schedule Employees Association (Union) as the exclusive representative of certain employees previously recognized under the terms of the collective bargaining agreement in effect between the Town and the Union.

WE WILL NOT unlawfully withdraw recognition from the Union as the exclusive representative of the following positions previously recognized under the terms of the collective bargaining agreement in effect between the Union and the Town:

Building Inspector  
 DPW Field Superintendent  
 DPW Water Facilities Superintendent  
 Fire Department Secretary  
 Health Director  
 Recreation Director  
 Chief Assessor

WE WILL NOT in any like manner, interfere with, restrain and coerce any employees in the exercise of their rights guaranteed under the Law.

WE WILL restore the *status quo* by immediately restoring recognition to the Union as the exclusive representative of the positions set forth above.

[signed]  
TOWN OF GREENFIELD

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