

In the Matter of UNIVERSITY OF MASSACHUSETTS

and

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS

Case No. CAS-03-3563

**17.5**     *public employee*  
**34.2**     *community of interest*  
**34.91**    *accretion*  
**35.826**   *campus police*

June 29, 2005

Allan W. Drachman, Chairman  
Helen A. Moreschi, Commissioner

Hugh L. Reilly, Commissioner (Dissenting)

Richard Ong, Esq.            *Representing the University of  
Massachusetts*  
Robert Dickson                *Representing the International  
Brotherhood of Police Officers,  
NAGE, AFL-CIO*

## DECISION<sup>1</sup>

### Statement of Case

The International Brotherhood of Police Officers, NAGE, AFL-CIO (Union or IBPO) filed the above-referenced petition with the Labor Relations Commission (Commission) on December 15, 2003 seeking to accrete police cadets (Cadets) into an existing bargaining unit of employees that it represents at the University of Massachusetts, Amherst campus (University or Employer).

The Commission conducted an informal conference regarding the petition on March 12, 2004 at which both parties submitted documents and were heard. The Commission sought additional information from the parties on November 18, 2004. The Union responded to that request on December 20, 2004, and the University responded on January 19, 2005.

On February 2, 2005, the Commission issued a letter directing the parties to show cause why it should not resolve the unit placement issue based on the information contained in that letter. On March 16, 2005, the University responded to that letter by providing two additional affidavits and other supplementary information. The Union submitted no further response.

### Facts<sup>2</sup>

#### *Background*

On February 4, 1976, the Commission, after conducting a secret ballot election,<sup>3</sup> certified the Union in Case No. SCR-2089 as the exclusive representative of the following units of employees employed by the University:

Unit A: All campus police officers below the rank of sergeant, excluding all others.

Unit B: All campus police sergeants and campus police lieutenants, excluding all others.

Local 432 of the Union and the Employer are parties to a collective bargaining agreement (Agreement) that was effective by its terms from July 1, 2000 to June 30, 2003. The Agreement covers both Units A and B. Article I of the Agreement, titled "Recognition," states in pertinent part:

The Employer recognizes the Union as the sole and exclusive bargaining agent for the purposes of establishing wages, hours, standards of productivity and performance and other terms and conditions of employment for all full-time and regular part-time employees in the bargaining units presently certified by the Labor Relations Commission or consented to by the parties.

Should any new classified classifications(s) be added to the work force, the Employer shall notify the Union of such new classification(s). The Employer and Union shall consult to mutually determine if such new classification(s) shall be added to the bargaining unit. If the parties cannot agree, the matter may be referred to the State Labor Relations Commission by either party, with a request that the Commission make that determination.

There are at least two other non-academic bargaining units on the Employer's Amherst campus. AFSCME Council 93 (AFSCME) represents a bargaining unit of approximately 850-900 trade, maintenance and security employees including the position of Institutional Security Officer (ISO) II.<sup>4</sup> SEIU Local 888 (formerly Local 509) represents a bargaining unit of exempt employees, including those employees who supervise ISO II's.

#### *Police Cadet Program*

On an unspecified date in 2002, the University laid off two of the three ISO II's, leaving only one ISO II on the Amherst campus. In or around November 2002, the Employer's Department of Public Safety announced the creation of a new policing initiative, the "Police Cadet Program" (the Program). The purpose of the Program was to train and employ college students majoring in law or law enforcement to assist campus police officers in their daily duties. These students did not need to matriculate at the University.

Chief of Police Barbara O'Connor (Chief O'Connor) implemented the Program. The University issued a working draft of the

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's jurisdiction is uncontested.

3. Two other unions, AFSCME, Local 776, and the Massachusetts State Employees Association, appeared on the ballot.

4. The Commission certified AFSCME Council 93 as the exclusive representative of that bargaining unit in Case No. SCR-2231. Other titles in that unit include Animal Caretaker, Electrician, Launderer, Cook, Plumber and Steamfitter, Painter, Trades Worker, Maintainer, and Metal Worker. On August 23, 2004, the Commission notified AFSCME of the pendency of the instant petition and requested that it notify the Commission by September 10, 2004 if it had an interest in the positions at issue in the petition. AFSCME did not respond.

Program's policies and procedures (Working Draft) on or about November 27, 2002. The University also issued a Fact Sheet regarding the Program on some unspecified date and two Form 30s for the position. Although both the Form 30s are dated November 30, 2002, their contents are slightly different, as discussed in more detail below.

The Fact Sheet and the Working Draft state that the purpose of the Program is "to help ensure the safety of the campus, to serve the community in assuring their personal welfare, to reduce the impact of crime and to assist the University's police officers as their 'eyes and ears' while on patrol." Cadets are appointed pursuant to, and have police powers under, M.G.L. c. 75, §32A, including certain limited arrest powers.<sup>5</sup>

Cadets must be at least 18 years old and high school graduates enrolled in a college or university pursuing a degree in law enforcement. Cadets must hold and maintain a 2.5 Grade Point Average (GPA) throughout their employment and provide proof of their GPA before the beginning of each semester.

Cadets must be able to successfully pass a Criminal History (CORI) and Registry of Motor Vehicle (RMV) background investigation, a detailed personal background investigation and possess an active driver's license for passenger vehicles. Once hired, Cadets must obtain certifications in Automatic External Defibrillator and First Aid and CPR, as required under M.G.L. c. 111, §201. Cadets receive 160 hours of in-house training.<sup>6</sup>

The University hires all Cadets as "CC/03" or hourly employees. The starting hourly rate for all Cadets, regardless of experience, is \$12.00 an hour. They receive no health insurance or retirement benefits. Under the terms of the Working Draft, Cadets who work more than eight (8), continuous hours are paid time and a half their hourly wage (\$18.00 an hour). Cadets work only when the University is in session, *i.e.* not during school vacations or summer recess.

Cadets wear a uniform provided by the University and carry handcuffs, pepper spray and a baton. They are not otherwise armed. They are expected to conduct all patrols on foot and are prohibited from asking for, or accepting rides from, campus Police Officers. They are permitted to use campus radios.

The University has hired twenty-six (26) Cadets since the Program's inception in April 2003. Seventeen (17) of those Cadets

were still employed as of January 2005. They work an average of 8 to 16 hours a week. One Cadet, who assists Chief O'Connor in administering the Program, works 20 hours a week. The University plans to employ thirty (30) Cadets in fall 2005.

As a rule, the Cadets receive daily supervision and direction from Lieutenants or Sergeants. Chief O'Connor assigns the Cadets to different shifts and assignments, taking into account their class schedule. Chief O'Connor also forwards e-mails to the Cadets or the shift supervisors if she needs the Cadets to perform a specific assignment.

Once Cadets graduate, they are no longer eligible to be Cadets and are terminated. Cadets who fail to maintain a 2.5 GPA are also subject to termination or non-renewal. Three Cadets have been terminated and/or suspended for cause by Chief O'Connor since the Program began.<sup>7</sup>

The second Form 30<sup>8</sup> for the Cadets states in pertinent part:

*Supervision Received*

Works under the direct supervision of an employee of higher grade who assigns and reviews work for proper performance and conformance with State and University laws, rules, regulations, instructions and procedures. The senior most police officer may act as Officer-in-Charge of a shift, in the absence of a person of higher grade.

*General Statement of Duties and Responsibilities*

Patrols assigned areas of property used, owned or occupied by the University of Massachusetts and areas adjacent to the University to provide a safe and secure environment for all members of the University community by means of an alert and vigilant preventive patrol; investigates crimes and enforces State laws as well as the rules and regulations of the University; delivers a wide variety of service consistent with the needs of the University, its students, staff and visitors,<sup>9</sup> performs related work as required.

*Detailed Statement of Duties and Responsibilities*

1. Exercises police powers under M.G.L. c. 75, §32A in the detection and apprehension of law violators; investigates crimes and complaints; by policy, arrest powers are limited.<sup>10</sup>

2. Patrols lands of the University ensuring the protection of persons and property, being observant for criminal activity, or anything which might endanger life, health and safety or result in theft or damage to property and reports same to police for the appropriate action to be taken.<sup>11</sup>

...

5. M.G.L. c. 75, §32A states in pertinent part that: "The trustees may appoint as police officers persons in the employ of the university who in the enforcement of said rules and regulations and throughout university property shall have the powers of police officers, except as to service of civil process."

6. The first class of Cadets also received training from the Intermittent Police Officer Training Program established by the Massachusetts Municipal Police Training Committee. However, a supplementary affidavit provided by Chief O'Connor states that all outside training was subsequently eliminated due to cost considerations.

7. A supplementary affidavit provided by Chief O'Connor in response to the Commission's show cause letter indicates that Lt. Thomas O'Donnell, who is a member of Local 432 B, disciplines the Cadets. Chief O'Connor does not otherwise dispute that she has terminated and/or suspended three Cadets.

8. As noted above, the University prepared two slightly different Form 30s, both dated November 30, 2002, describing the Cadet position. The "Detailed Statement of Duties and Responsibilities" contained in the first Form 30 is identical to that set forth in the Police Officer Form 30, with only one exception. Unlike Cadets, Police Officers "safeguard monies and securities from University and Federal repositories to and from the bank, and furnish escort services as required." The differences between the first and second Cadet Form 30s (and, by extension, between the second Cadet Form 30 and the current Police Officer Form 30) are set forth in notes 9-14, *infra*.

9. The first Cadet Form 30 included the phrase "may provide emergency coverage in various classifications."

10. The first Form 30 omitted the phrase "by policy arrest powers are limited."

11. The first Form 30 omitted the phrase "to police."

6. Maintains order at the scene of special events, whether scheduled or unscheduled, upon the lands of the University, in limited circumstances, as directed by a Police Supervisor.<sup>12</sup>

7. Conducts limited investigations and submits necessary accurate reports as related to the enforcement of State, local laws and University rules and regulations.<sup>13</sup>

8. Identifies criminal offenders, makes apprehensions as limited by policy when required and participates in court proceedings as needed.<sup>14</sup>

...

12. Ensures that all prisoners in their care are processed in accordance with departmental Policies/Procedures.

13. May provide emergency first aid and other calls for professional assistance as required.

14. Acquires and demonstrates specialized law enforcement skills; may participate in various community crime prevention programs, departmental outreach programs.

As of March 2005, the Cadets' duties include conducting foot patrol and prisoner watches; providing assistance in the police station as needed; issuing summonses for simple misdemeanors; watching cruisers; checking doors; entering buildings (as far as the lobby) to speak with dormitory staff; monitoring doors for search warrants; providing first aid (appropriate to their level of training) outside buildings, unless directed by a supervisor.

The University also states that the Cadets' duties are changing and that, at some unspecified future date, the Cadets will be assigned to conduct dormitory security, a function that neither the Police Officers nor the ISO II's perform.

#### *Bargaining History*

On December 4, 2002, Union National Representative Robert Dickson (Dickson) wrote a letter to University Labor Relations Administrator Nicholas Marshall (Marshall) stating that Dickson had recently met with members of Locals 432A and B regarding the Program. Dickson expressed the Union's concern over this staffing change and asked to negotiate over its impact on unit members' terms and conditions of employment, if any, as well as the possibility of accreting the Cadets into Local 432.

Dickson wrote a second letter to Marshall on December 4, 2002 summarizing Local 432A & B's position with respect to the Program. The letter set out six proposals regarding the Program's impact on the bargaining units, including proposals relating to overtime, layoffs, and compensation for the bargaining unit members who would train Cadets. The sixth and final proposal states: "The University (U-Mass) will recognize these cadets as Unit C of Local 432 IBPO."<sup>15</sup> Marshall replied to Dickson's letter on Decem-

ber 18, 2002. With respect to whether Cadets should be included in the Union, Marshall wrote:

The Police Cadets will be college students majoring in Criminal Justice, who will work about 10 (ten) hours per week. This position is intended to provide a degree of supplemental Public Safety protection on campus. However, the main focus of the program is to provide a ready and known group of recruits for future police officer positions. We believe these employees, given their relatively low weekly hours, are not appropriate for the unit.

On January 30, 2003, Dickson wrote to Marshall asking to impact bargain over four matters relating to the implementation of the Program: overtime, reduction-in-force, supervision and training.

On February 24, 2003, the Union sent a memo to Chief O'Connor and Marshall regarding the Program. Handwritten notes at the bottom of the memo indicate that a meeting was held on March 7, 2003 at which the parties reached agreement as to certain layoff and overtime issues. Next to the handwritten agenda item, "unionize as unit C" were the letters "LRC."

The parties ultimately agreed to certain conditions surrounding the start-up and implementation of the Program, as reflected in an unsigned, undated Memorandum of Agreement, which states:<sup>16</sup>

1. No overtime opportunity will be created or filled by a cadet, nor shall cadet assignments be made to reduce overtime opportunities for regular, full-time officers.

2. Generally, the cadets will work no more than 16 hours per week.

3. There shall be no reduction in force, reduction of hours, nor demotions due to budgetary constraints for any regular full-time patrolmen, sergeants, and lieutenants so long as the cadet program exists. All cadet work will cease, and the program abolished if a reduction in force of regular full-time officers occurs.

4. Training of cadets will be conducted on a primarily overtime basis for the instructors who are regular full-time officers of the U-Mass Police Department.

5. One unit-A (patrolman) member will be assigned as a liaison for the cadets and the department on an overtime basis for 8 hours on every Friday and Saturday night from April 1, 2003 (approx.) to the end of the semester, May 15, 2003 (approx.)

6. The cadet program will be reviewed by the University and the Union as needed and at the end of the program (May 15, 2003 - approx.)

#### *Duties and Responsibilities of ISO II's and Police Officers ISO II's*

The University contends that the Cadets' functions are similar to those of the ISO II's. The Form 30 for the ISO II states in pertinent part:

#### *General Statement of Duties and Responsibilities*

12. The first Form 30 prepared for this position omitted the phrase, "in limited circumstances, as directed by a Police Supervisor."

13. The first Form 30 omitted the word "limited."

14. The first Form 30 prepared for this position omitted the phrase "as limited by policy."

15. At the informal conference, the Union provided a marked-up copy of this letter, on which the word "okay" is handwritten next to four out of five of the Union's proposals. Handwritten next to the Union's proposal that the University recognize the Cadets in Unit C are the letters "LB", purportedly standing for "Labor Board."

16. Although the Memorandum of Agreement was never signed, the University does not dispute that it accurately reflects the terms of the parties' agreement.

Patrols and protects University buildings, grounds, equipment and personnel as well as students, visitors, against possible loss or damage from such causes which may endanger public safety . . .

*Detailed Statement of duties and responsibilities*

1. Patrols University buildings, property and parking lots in order to ensure their security, detects and prevents fire or other hazards and prevents theft and damage to property. Notifies University police officers of presence of known trespassers. Calls for assistance as necessary and ensures that responsible parties are notified.
2. Performs regular campus patrol in assigned areas and takes proper steps in calling for assistance when criminal activity or anything that would endanger the University community is observed. Documents observations of noteworthy incidents occurring during tours of duty.
3. Directs automobile traffic on University property, enforces parking regulations, issues parking tickets and prevents unauthorized use of parking facilities.
4. Searches University property, both on campus and at remote locations . . . and assists University police officers.
5. Provides emergency first aid to victims, other University personnel, students, and general public and calls for assistance as necessary. Provides assistance to employees, students, and general public as required during adverse weather conditions and other emergency situations.
6. Operates a motor vehicle in order to transport employees, students, general public and materials as necessary. Assists University police officers with transportation observation and care of prisoners . . . .
7. Assists University police officers at immediate scene of motor vehicle or other accidents and/or complaints, as necessary. Appears in court to testify for the University as a witness to certain criminal acts or parking violations which have occurred . . . .
8. Controls crowds during emergencies or special events, by maintaining order among staff, students and visitors; may evacuate areas and directs traffic as necessary. Assists University police with bomb scare evacuations as required.
9. May exercise functional supervision over a few student employees assigned to work in an emergency situation.

ISO II's must be high school graduates and have some knowledge of first aid at hire. Within one year after appointment, they are required to obtain certification in First Aid and CPR. ISO II's must also possess a valid Class D Massachusetts License to operate vehicles.

*Police Officers*

The Union contends that the Cadets should be accreted into the Police Officer unit.<sup>17</sup> University Police Officers are full-time employees that are on duty at the University 365 days a year. Under the provisions of Chapter 467 of the Acts of 2004, Police Officers

must be at least 21 years of age. There are approximately forty-two (42) members of Unit A.<sup>18</sup>

The Form 30s for University Police Officers (dated 1/28/85) and Cadets, set forth above, contain identical descriptions under the headings, "General Statement of Duties and Responsibilities" and "Supervision Received." Under the heading "Direct Reporting Staff", the Police Officer Form 30 states: "Institutional Security Officers, Student Security."<sup>19</sup>

As set forth in footnote 8, above, the "Detailed Statement of Duties and Responsibilities" contained in the original Cadet Form 30 is identical to the Police Officer Form 30, with one exception relating to safeguarding and transporting money. The differences between the second Cadet Form 30 and the Police Officer Form 30 are set forth in notes 9-14, above.

Under the heading "Qualifications Required at Hire," the Police Officer Form 30 states as follows:

1. Successful completion of the requirements of Physical Agility testing;
2. Oral interview and recommendation by the Community Review Board;
3. Recommendation upon completion of psychological evaluation test;
4. Certification of medical physical examination as set by the standards of the Massachusetts Criminal Justice Training Council;
5. Physical ability and alertness necessary to perform duties;
6. Ability to maintain good order and acceptable personal demeanor under periods of stress, verbal and physical abuse, danger and emotional tension;
7. Ability to deal effectively with all members of the University community and with the public;
8. Ability to work in all types of weather conditions/climates;
9. Ability to recognize fire, health and safety hazards;
10. Ability to follow verbal and written instructions;
11. Possession of a valid Massachusetts License to operate motor vehicles;
12. Completion of a background investigation; no conviction record of a felony;
13. Oral interview by the Executive Director of the Division of Public Safety.

Under the heading "Skills Acquired on the Job," the Form 30 states that Police Officers must obtain certification in firearms proficiency twice a year and graduate from an approved police academy or the Massachusetts Criminal Justice Training Council.

17. At the informal conference, the Union stated that it would prefer the Commission to place the Cadets into a separate "Unit C." However, in a letter dated January 7, 2005, the Union states that it would be "far easier to absorb the Cadets into the existing unit of patrol officers at the University of Massachusetts."

18. There are approximately ten (10) members of Unit B - two (2) lieutenants and eight (8) sergeants.

19. The Commission takes administrative notice of the fact that, as described in *Board of Trustees of the University of Massachusetts*, 28 MLC 225, 229 (2001), the University employs a number of University students who provide security in the dormitories. Because the Police Officer Form 30 predates the creation of the Cadet position, the Commission presumes that the reference to Student Security refers to the student dormitory security officers and not to the Cadets at issue here.

Police Officers attend the Police Academy for 22 weeks. In addition to carrying handcuffs, a baton and pepper spray, they are authorized to carry a handgun, shotgun, and taser. Police Officers also perform the following duties not specifically set out in the Form 30:

Assist Federal Bureau of Investigation; Accident investigation; Drunk-driving arrests; Issues motor vehicle citations; Evidence maintenance; Detective duties; Computer crimes; Hate crimes; Weapon call; Felony investigations; Arrest for all offenses; Drug investigations; Crime scene fingerprints; Undercover investigations; Mounted police; Bike patrol; Traffic duty; Crowd control; Special weapons; Patrol remote campus property; Computer aided dispatch & dispatch function; Desk duty; K-9 officer; Arrest warrants and search warrant execution; Rape aggression instructor; Operate cruiser including high-speed pursuits; Response to large disturbances; Identification kit investigation; Rape investigation; Overtime details including large-scale concerts; Write policy;<sup>20</sup> Child safety seat technician; Firearms training and instruction in firearms, baton, and O.C.<sup>21</sup> defensive tactics.

The Chief of Police or Deputy Chief of Police disciplines the Police Officers. Police Officers are also eligible to be promoted to sergeant, lieutenant and/or deputy chief.

#### Opinion

A CAS petition is a procedural vehicle that permits the Commission to clarify or amend the scope of an existing bargaining unit. To determine whether a position should be accreted into an existing bargaining unit, the Commission traditionally considers three factors: 1) whether the position was included in the unit at the time it was originally recognized or certified; 2) whether subsequent bargaining history reflects that the parties considered the position to be included in the unit; and 3) whether the position shares a community of interest with other positions in the existing bargaining unit. *Randolph School Committee*, 27 MLC 25, 26 (2000); *Town of Somerset*, 25 MLC 98, 100 (1999); *Hanover School Committee*, 24 MLC 83, 87 (1998). The purpose of this test is to ascertain and give effect to the mutual intent of the parties. *Massachusetts Port Authority*, 5 MLC 1844, 1851 (1979). However, where the position sought to be accreted did not exist at the time of the original certification, and the parties have not otherwise agreed to include or exclude that position since it was created, the Commission attempts to ascertain the presumed intent of the parties by examining the nature of the work performed by unit employees and determining whether this is the kind of work that the parties reasonably would have included in the unit at the time of certification. *Id.*, citing *Boston School Committee*, 5 MLC 1628 (1979).

Here, the Cadet position was created in November 2003, approximately 27 years after the Commission first certified the Union's bargaining units. Accordingly, the first prong of the accretion test is inconclusive.

Next, we must examine whether subsequent bargaining history reflects that the parties considered the position as included in the unit. Absent bargaining history to support a finding that the parties addressed and resolved the unit placement of the contested position, the Commission will find that it is unable to determine whether the parties explicitly agreed to exclude the contested position from the bargaining unit. *Town of Somerset*, 25 MLC at 100. Here, the record reveals that on several occasions when the parties were impact bargaining over the Program, the Union proposed that the University accrete the Cadets into its existing unit. The record reveals that the parties did not reach agreement on this issue, and that the Union chose instead to have the Commission decide the unit placement issue. Because the parties did not resolve the unit placement of the Cadets, the analysis under the second portion of the accretion test is also inconclusive.

We must therefore decide whether the Cadets share a community of interest with the Police Officers represented by Local 432A of the Union. Preliminarily, we address the University's suggestion that, as a matter of policy, the Commission should avoid creating units that consist of, or include, 03 employees, because 03 employees are not eligible for the health insurance or retirement benefits available to public employees under M.G.L. c. 32 and 32A. The Commission will not deprive 03 personnel, as a class, of collective bargaining rights based solely on the fact that they are paid from an 03 account. *Board of Regents of Higher Education Southeastern Massachusetts University (Board of Regents)*, 11 MLC 1486 (1985). Rather, the Commission presumes that individuals who perform services for a public employer for compensation and with supervision are public employees as defined in Section 1 of M.G.L. c. 150E (the Law), regardless of the source of their compensation. *Id.* at 1497. This presumption may be rebutted by evidence that the employer does not retain control over the individual worker. *Id.*

In the present case, there is no dispute that the Cadets perform services for a public employer for compensation and that their work is supervised daily by lieutenants and/or sergeants, with oversight by the Chief of Police. As stated in the prior paragraph, the fact that the Cadets may not be eligible for certain benefits that other employees receive from the University does not negate their status as statutory employees. *Board of Regents*, 11 MLC at 1496. We therefore conclude that the Cadets are employees within the meaning of M.G.L. c. 150E and turn to the issue of whether the Cadets share a community of interest with the Police Officers.

To determine whether employees share a community of interest, the Commission considers factors like similarity of skills and functions, similarity of pay and working conditions, common supervision, work contact and similarity of training and experience. *Waltham School Committee*, 25 MLC 137, 139 (1999). The Commission traditionally favors broad, comprehensive units over small, fragmented units. *Higher Education Coordinating Council*, 23 MLC 194, 197 (1997). No single factor is outcome determina-

20. The University provided no details regarding what policies, if any, Police Officers have written.

21. The record does not reflect what "O.C." means.

22. The University provided the information contained in this and the preceding paragraph in response to the Commission's show cause letter.

tive. *Town of Ludlow*, 27 MLC 34 (2000) citing *City of Worcester*, 5 MLC 1108, 1111 (1978). Community of interest does not require an identity of interest, provided there is no inherent conflict among consolidated groups of employees. *Town of Somerset*, 25 MLC at 100, citing *Franklin Institute of Boston*, 12 MLC 109 (1985). The Commission has consistently found a community of interest among employees who share a similarity of interests and working conditions based upon common supervision and similar work environment. *Springfield Water and Sewer Commission*, 24 MLC 55, 59 (1998) (citations omitted).

As described above, there are notable differences in the hours, pay benefits and training of Cadets and Police Officers. Police Officers work year-round, while Cadets work during the school year only, for an average of 8-16 hours weekly. Cadets are not eligible for University health insurance or retirement benefits or for promotion to positions in Unit B or above. Police Officers are required to attend a 22-week Police Academy, while Cadets receive 160 hours of in-house training. Cadets do not carry guns, nor do they use cruisers to patrol University lands.

The University argues that these differences, particularly the differences in benefits, will inevitably lead to conflicts in the bargaining unit, as the Cadets will become frustrated by the inability of the University to provide them with certain benefits due to their 03 status. However, a difference in benefits, standing alone, does not demonstrate a “fundamental divergence in community of interest.” *Board of Regents*, 11 MLC at 1498. Rather, they may merely reflect the gains achieved by unionized workers as a result of collective bargaining. *Id.*

Moreover, the Commission has placed part-time or hourly employees in units with their full-time or salaried counterparts where there is other evidence that both groups share a community of interest. See, e.g., *Town of Seekonk*, 30 MLC 121, 127 (2004) (part-time high school library pages included in library employee unit); *Town of Milford*, 22 MLC 1625, 1630 (1996) (same); *Town of Sturbridge*, 29 MLC 156 (2003) (part-time firefighters included in firefighter unit); *Worcester County*, 17 MLC 1352, 1360 (1990) (temporary employees held to have a community of interest with permanent employees despite differences in training and lack of benefits and step increases); *Town of Sterling*, 4 MLC 1704 (1978) (regular part-time hourly police officers shared a community of interest with regular full-time police officers). Accordingly, we do not find that the foregoing differences in working conditions between the Cadets and Police Officers are so significant as to produce inevitable conflicts in the bargaining unit. We therefore turn to the similarities in the Cadets’ and Police Officers’ working conditions to determine whether they otherwise share a community of interest.<sup>23</sup>

As reflected on their respective Form 30s, the general duties and responsibilities of both positions, and the supervision they receive, are identical. Both positions are charged with performing a variety

of patrol and security functions to ensure the safety of the University’s property, employees and students, under the direction and supervision of lieutenants or captains. Both positions are subject to discipline by the Chief of Police and are appointed pursuant to M.G.L. c. 75, §32A. Moreover, the Cadets necessarily have frequent and regular contact with the Police Officers, because the Cadets function as the Police Officers’ “eyes and ears” while on patrol. Although the extent of the Cadets’ police powers are more limited than those of the Police Officers, at their core, both positions provide a variety of security functions that protect the University’s property, employees, and students, under similar, if not identical supervision and working conditions.

This case is therefore analogous to *Board of Trustees, University of Massachusetts/Lowell*, 23 MLC 273 (1997), where the Commission concluded that campus ISO’s, police officers, residence hall security officers, and dispatchers formed an appropriate unit for bargaining because of their shared roles in providing campus security, although in a variety of different ways. We similarly conclude that, based on their common security functions and work environment, the Cadets share a community of interest with the Police Officers sufficient to justify their accretion into Unit A.

In so holding, we reject the University’s argument that accreting the Cadets into the unit would cause them to bargain with their supervisors. There is no evidence, and the University does not contend, that the Police Officers who are members of Unit A supervise the Cadets. Moreover, assuming without deciding that the police sergeants and lieutenants who comprise Unit B are true supervisors, the Union seeks to accrete the Cadets into Unit A, not Unit B. The Commission’s traditional concerns about placing supervisors in the same unit with the employees that they supervise therefore do not apply in this situation. See, e.g., *Town of Bolton*, 25 MLC 62, 67 (1999).

We also reject the University’s argument that the Cadets should be given the opportunity to express their intentions in an election because they have not indicated to the University that they wish to be represented in any bargaining unit. The Commission has recognized that some proposed accretions will involve groups of employees whose number or other characteristics may raise a question concerning representation such as to warrant election. See, e.g., *Waltham School Committee*, 25 MLC 137, 140 n. 17 (1999); *Massachusetts Laborers’ District Council*, 15 MLC 1178, 1180-1181 (1988), citing *City of Worcester*, 11 MLC 1363, 1366 (1986). However, where there is no evidence that a question of representation exists, employees in newly-created positions properly may be accreted without first having an election into an existing bargaining unit with which they share a community of interest, and are properly governed thereafter by the unit’s choice of exclusive representative. *Massachusetts Laborers’ District Council*, 15 MLC at 1180.

23. Because AFSCME has not intervened in this proceeding, we need not address the University’s argument that the Cadets are more similar in function to the ISO II’s who are members of AFSCME Council 93’s unit.

The Commission has previously found a question of representation to exist where: 1) the number of employees sought to be accreted exceeds the number of employees in the existing unit, *see, e.g., Massachusetts Bay Transportation Authority*, 20 MLC 1330 (1993); or 2) the positions sought to be accreted either existed, unchanged, at the time of the original certification or recognition, and/or the positions have been intentionally excluded from the unit by the parties since they were created. *See, e.g., Waltham School Committee*, 25 MLC at n. 17, *citing Town of Agawam*, 2 MLC 1367 (H.O. 1976) (discussing *Ladish Co.*, 176 NLRB 150 (1976)). *See also City of Worcester*, 11 MLC at 1366. Because neither of those circumstances is present in the instant case, the University has failed to demonstrate that the accretion of the Cadets raises a question concerning representation sufficient to warrant an election.<sup>24</sup>

#### Conclusion

Based on the foregoing, we determine that Cadets are appropriate for inclusion in Unit A of the bargaining unit currently represented by the Union and we hereby direct that they be included in that unit. The Unit A bargaining unit description shall be amended to include the Cadets.

SO ORDERED.

#### COMMISSIONER REILLY'S DISSENT

On December 15, 2003, the International Brotherhood of Police Officers (IBPO) filed the Petition For Clarification Or Amendment (Petition) in this case. The Petition describes the existing bargaining unit as "Full time police officers, sergeants [sic], lieutenants, and captains". Employees excluded are "Deputy Chief, Chief and all other employees". It identifies the "disputed position(s)" as "Police Cadets (Student Officer)". The reason stated for including the Police Cadets in the IBPO's existing bargaining unit is that they are "performing police duties on or about the UMass campus under the supervision of regular full time officers."

#### The Investigation

The Commission, through its agent, conducted an investigation of the Petition. The investigation produced the following information. There are two bargaining units at UMass represented by the IBPO, Unit A and Unit B. In Unit A, there are approximately 42 Patrol Officers. In unit B there are ten employees, two lieutenants and eight sergeants. As of January 2005, there were 17 Police Cadets; UMass intends that, by the Fall of 2005, the Police Cadets would number about 30.

The investigation shows that UMass and the IBPO negotiated a Memorandum of Understanding (MOU) which states:

1. No overtime opportunity will be created or filled by a cadet, nor shall cadet assignments be made to reduce overtime opportunities for regular, full-time officers.
2. Generally, the cadets will work no more than 16 hours per week.
3. There shall be no reduction in force, reduction of hours, nor demotions due to budgetary constraints for any regular full-time patrolmen, sergeants, and lieutenants so long as the cadet program exists. All cadet work will cease, and the program abolished if a reduction in force of regular full-time officers occurs.
4. Training of cadets will be conducted on a primarily overtime basis for the instructors who are regular full-time officers of the UMass Police Department.
5. One unit-A (patrolman) member will be assigned as a liaison for the cadets and the department on an overtime basis for 8 hours on every Friday and Saturday night from April 1, 2003 (approx.) to the end of the semester, May 15, 2003 (approx.)
6. The cadet program will be reviewed by the University and the Union as needed and at the end of the program (May 15, 2003-approx.)

There is no information in the record suggesting that the Cadets were represented when the MOU was negotiated between UMass and the IBPO, that they represented themselves, or otherwise participated in the negotiation of the MOU in any way.

For present purposes, a detailed side-by-side comparison of the job duties of the regular full-time patrol officers (Patrol Officers) and the Cadets is not necessary. In general, though, it is accurate to say that the Cadets are students, and not, like Patrol Officers, full-time employees; Cadets are paid on an hourly basis and work about 16 hours per week, and are not, like Patrol Officers, full-time salaried employees; Cadets receive no compensation beyond their hourly rate and, unlike Patrol Officers, do not receive non-salary benefits such as health insurance and pensions; Cadets receive initial orientation and training that is similar to Patrol Officers, but do not have as much training or experience; that some of the more basic duties of Cadets and Patrol Officers overlap, but that more substantial duties are reserved for Patrol Officers; and that while ultimate supervision is the same for Cadets and Patrol Officers, Cadets report to Patrol Officers on a day-to-day basis; and Cadets' schedules accommodate the UMass holiday and vacation schedule, unlike Patrol Officers, who work full-time year-round.<sup>25</sup>

#### Issue Presented and Answer

The issue presented is: should the Cadets be "accreted" into the bargaining unit of Patrol Officers represented by the IBPO. The

24. In *City of Worcester, supra*, the city filed a unit clarification petition seeking to accrete fire alarm operators into a unit of police dispatchers. The Commission dismissed that petition partly because the fire alarm operators had not had the opportunity to vote on whether they wanted to be included in the police dispatchers' union. 11 MLC at 1366. The Commission also dismissed the petition, because the fire alarm operators existed at the time the police dispatchers' unit was certified. The Commission specifically held that dismissal of the petition would be appropriate on those grounds alone. *Id.* at 1366. Here, because the Cadets did not exist at the time the Police Officers were certified as a bargaining unit, *City of Worcester* is materi-

ally distinguishable from the instant case. Therefore, the fact that the Cadets have not expressed their position regarding this petition does not, without more, alter our conclusion that this petition fails to raise a question concerning representation.

25. These differences, contrary to the conclusion of the majority, must be analyzed to determine whether an accretion is appropriate. *Town of Wenham*, 26 MLC 41, 42 (1999). When they are analyzed here, it is apparent that there is "no community of interest", and that "accretion" is, therefore, not appropriate.

majority answers that question “yes”, but for reasons that follow, I answer “no”.

#### Reasons To Answer “No”

“Accretion” is the practice of merging or absorbing one group of employees into an existing bargaining unit without the employees’ vote. It is not required by any provision of c. 150E, M.G.L., but is justified only by certain policy reasons said to support it. Accretion is not the rule, but an exception to the rule.

Because I think that employees have the right to decide for themselves whether or not to be represented by an employee organization or deal directly with their employer on employment issues, and, if they decide to be represented, to select that organization, I dissent from the majority’s decision to accrete the Cadets into the unit of Patrol Officers.

There are a number of subsidiary points that will be treated separately.

#### Employee Free Choice

The Commission’s decisions in all cases, as they should, are determined to foster employees’ free choice with respect to collective bargaining. In *Town of Wakefield*,<sup>26</sup> the union and town negotiated a collective bargaining agreement after the Commission had determined that a question of representation (QCR) existed. Finding a violation, the Commission concluded that such conduct “undermines the exclusive function of the Commission to settle controversies concerning the representation of employees by secret ballot or other means which guarantee employee free choice.”<sup>27</sup> Similarly, where a sample ballot modification could have been construed as the Commission’s support for an election outcome, the Commission overturned the election because “the Commission seeks to ‘ensure . . . that employees voting in a representation election exercise free and informed choice.’”<sup>28</sup> And the Commission evaluates election campaign materials against their having “a reasonable tendency [for the document] to interfere with employee free choice.”<sup>29</sup> One might reasonably wonder why the Commission has all of this concern about the niceties of the conduct of an election, but not with whether employees get an election at all.

#### Accretion Analysis

The Commission does employ/allow accretions of unrepresented employees to existing bargaining units. The general standard ap-

pears to take three steps, proceeding one to the other only if the prior step is “inconclusive”:

- 1) Examine the original certification and determine whether the sought employee classifications were included in the original certification.
- 2) If that examination is inconclusive, examine the parties’ subsequent conduct including successive collective bargaining agreements to determine whether the employee classifications were considered by the parties to be included in the bargaining unit.
- 3) Failing that, examine the community of interest between the employees sought and the employees already in the unit.<sup>30</sup>

#### Missing Element

The employee “free choice” concerns reflected above are simply missing from the three stage accretion analysis listed in *City of Lowell*. Nevertheless, the Commission has been uneasy with such a serious and substantial omission. In *City of Lowell*, itself, the Commission dismissed the petition because “[s]uch an accretion clearly would deprive the majority of the members of the proposed unit of the opportunity to select the bargaining representative of their choice.”<sup>31</sup> That possible exception to the three-step test would appear to be limited to cases where the “accreted” group is larger than the existing unit.

That is not so under another statement of the exception, however. In *City of Worcester*,<sup>32</sup> the Commission stated the rule more generally and with no restriction:

We are ordinarily cautious in placing disputed employees in a bargaining unit through the vehicle of an accretion because we are reluctant to impose a bargaining representative on employees who have not elected to be so represented. *Massachusetts Port Authority*, 5 MLC 1844, 1851 (1979). The Fire Alarm Operators have not had the opportunity to vote on whether they want Local 495 to represent them. We decline to make that decision for them.<sup>33</sup>

#### Analysis and Conclusion

As has been shown, “accretion” is a doctrine of uncertain limits that undermines that premise of the Law that employee organizations become exclusive representatives through employees’ free choice. Nothing presented during the Commission’s investigation gives an indication, one way or the other, how the Cadets would vote on representation, for the IBPO, for another employee organization, or for no representation.<sup>34</sup> Where, as here, the Cadets have not voted, and where, as here, the IBPO and UMass negotiated a MOU that can be read as having adverse impact upon the Cadets, a

26. 10 MLC 1016 (1983).

27. *Id.* at 1019 (emphasis added).

28. *Commonwealth, Administration & Finance*, 10 MLC 1053, 1056 (1983).

29. *Commonwealth, Administration & Finance* 7 MLC 1293, 1295 (1980).

30. *City of Lowell*, 8 MLC 1328, 1329-1330 (1981).

31. *Id.* at 1331.

32. 11 MLC 1363 (1985).

33. *Id.* at 1366.

34. There is simply no factual basis here for the majority’s presumption that each Cadet’s vote can be presumed to be the same as each Patrol Officer’s, or that the Cadets in the aggregate would vote the same as the Patrol Officers in the aggregate. No one would suggest that political elections should be decided by the vote count at the end of the first hour’s voting. Neither should employees’ elections for bargaining representatives be determined by how others vote. How one person or group of people vote is a demonstrably unreliable indicator of how another person or group of people will vote. Moreover, here, not a single Patrol Officer or Cadet has voted or will vote on their wishes regarding a bargaining unit that includes both Patrol Officers and Cadets; the Patrol Officers arrived too soon, and the Cadets arrived too late.



question concerning representation is unavoidably presented. In such a situation, accretion is not the answer, but, upon a sufficient showing of interest, an election is.<sup>35</sup>

[signed]  
Hugh L. Reilly, Commissioner

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In the Matter of NORTH ATTLEBOROUGH ELECTRIC  
DEPARTMENT

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL 104

Case No. MCR-04-5091

- 33. **Consent Agreements and Stipulations**
- 34.2 **community of interest**
- 35.2 **confidential employees**
- 35.65 **other professional employees**
- 35.7 **supervisory and managerial employees**

June 29, 2005

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

Paul V. Mulkern, Jr., Esq. *Representing the North  
Attleborough Electric  
Department*

Wendy M. Bittner, Esq. *Representing the International  
Brotherhood of Electrical  
Workers, Local 104*

**DECISION AND DIRECTION OF ELECTION<sup>1</sup>**

Statement of the Case

On March 3, 2004, the International Brotherhood of Electrical Workers, Local 104 (Union) filed a petition in Case No. MCR-04-5091 seeking to represent a single bargaining unit consisting of certain full-time and regular part-time employees of the North Attleborough Electric Department (NAED). On May 4, 2004, the Union amended its petition to seek two bargaining units, a unit of administrative employees and a unit of field and operations employees. The Union subsequently amended its petition again on June 16, 2004 to seek three bargaining units: a bargaining unit of administrative, clerical, and information technology employees, a bargaining unit of field and operations employees, and a bargaining unit of supervisory employees.

On June 16, 2004 and August 19, 2004, a duly-designated Commission agent, Margaret M. Sullivan, Esq., conducted an investigation at which both parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. The parties filed post-hearing briefs postmarked on September 15, 2004.

The Union seeks to include the positions of operations division manager and business division manager in the supervisory bargaining unit. The NAED opposes that inclusion on the grounds that the operations division manager is a managerial employee

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35. "In appropriate cases, employees may be given the choice of being represented by the incumbent in an existing unit, or not being represented by any union, in an 'add on' election." *City of Worcester* at 1366 n. 3.

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.