

In the Matter of TOWN OF WAREHAM
and
UNITED STEELWORKERS OF AMERICA

Case No. WMAM-08-1017

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DECISION ON WRITTEN MAJORITY AUTHORIZATION CHALLENGES

Statement of the Case

On September 9, 2008, the United Steelworkers of America (Union) filed a Petition for Certification by Written Majority Authorization with the Division of Labor Relations (Division) seeking to represent a bargaining unit of employees employed by the Town of Wareham (Town). That petition covered the following twenty (20) mid-management positions: Technology Support Technician, Technology Support Technician - Police, Assistant Library Director, Assistant Director of Planning, Council on Aging Director, Harbormaster, Building Inspector Director, EMS Director, Health Agent, Information Systems Manager, Assessor, Assistant Director of Maintenance, Chief Plant Operator, Community Development Director (hereinafter referred to as CEDA Director), Library Director, Planning Director, Treasurer/Collector, Director of Municipal Maintenance, Town Accountant, and Police Chief.

The Division was designated as the neutral pursuant to Division Rule 14.19(4), 456 CMR 14.19(4). On November 10, 2008, the Town filed written challenges to the following eleven (11) positions: Recreation Director, Director of Senior and Social Services, EMS Director, Health Agent, Human Resources Director, Director of Assessment, Library Director, CEDA Director, Assistant Interim Town Administrator for Finance (Finance Director/Town Accountant) (hereinafter referred to as Town Accountant), Director of Municipal Maintenance, and Police Chief. Because the Division determined that the number of challenges was sufficient to affect the result of the written majority authorization process, the Division initiated proceedings to resolve the challenges.

The Union and the Town subsequently discussed the challenges and the petitioned-for positions and reached the following agreements: 1) the Harbormaster, Building Director Inspector, Chief Plant Operator, and Director of Assessment are included in the petitioned-for unit; 2) the Police Chief and the Assistant to the Board of Selectmen/Interim Town Administrator are excluded from the unit; 3) the status of the Assistant Library Director, Assistant Director of Planning, Assistant Director of Maintenance, Director of Planning and Resource Management, Director of Senior and Social Services, Human Resources Director, and Recreation Director will not be adjudicated in this case because the positions were vacant at the time that the petition was filed¹; and 4) the disputed positions are the following: EMS Director, Health Agent, Information Systems Manager, Technology Support Technician; Treasurer/Collector; Library Director; CEDA Director; Town Accountant, and Director of Municipal Maintenance. The Town and the Union submitted factual information and arguments in support of their respective positions. Neither party contests the jurisdiction of the Commonwealth Employment Relations Board (Board).

The Factual Record

The following opinion is based on affidavits, job descriptions and written documents submitted by the Town and the Union. There are no material facts in dispute, and the Board has reviewed all the submissions provided by the parties in making its decision. We have referenced key facts from the record in our decision, but need not recite the entire factual record here. We do wish to note, however, that we have not relied on the facts or decision in *Town of Wareham*, 14 MLC 1697 (H.O., 1988), an unappealed hearing officer representation case involving various administrative positions in the Town, because the record did not demonstrate that the duties and responsibilities of the positions at issue are the same now as the hearing officer found them to be in 1988.

Opinion

Managerial Employees

Section 1 of the Law contains the following three-part test to determine whether an individual is a “managerial” employee:

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.

An employee must be excluded from a bargaining unit under Section 3 of the Law if the person’s actual duties and responsibilities satisfy any one of the three statutory criteria. *Town of Manchester-by-the-Sea*, 24 MLC 76, 81 (1998).

To be considered a managerial employee under the first part of the statutory test, an employee must make policy decisions and determine the employer’s objectives. *Wellesley School Committee*, 1 MLC 1299, 1401 (1975), *aff’d. sub nom. School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112 (1978). This part of the analysis focuses on whether an employee possesses independent decision-making authority or whether the employee’s decisions are screened by another layer of administration. *Worcester School Committee*, 3 MLC 1653, 1672 (1977). The policy decisions must be of major importance to the mission and objectives of the public employer, *Wellesley School Committee*, 1 MLC at 1403, and the employee must participate in the policy decision-making process on a regular basis. *Town of Plainville*, 18 MLC 1001, 1009 (1991).

To be considered a managerial employee under the second part of the statutory definition, an employee must participate to a substantial degree in preparing for or conducting collective bargaining. Identifying problem areas to be discussed during bargaining or merely consulting about bargaining proposals is insufficient to satisfy this second criterion. *Town of Medway*, 22 MLC 1261, 1269 (1995). Rather, the employee must either participate in actual negotiations or be otherwise involved directly in the collective bargaining process by preparing bargaining proposals, determining bargaining objectives or strategy, or having a voice in the terms of settlement. *Town of Manchester-by-the-Sea*, 24 MLC at 81; *City of Boston*, 19 MLC 1050, 1063 (1992).

To be classified as a managerial employee under the third statutory test, an employee must exercise discretion without consultation or approval. *Town of Manchester-by-the-Sea*, 24 MLC at 81 (citing *Wellesley School Committee*, 1 MLC at 1408). To be “substantial,” the responsibility must not be perfunctory or routine; it must have some impact and significance. *Id.* Further, the appellate authority must be exercised beyond the first step in a grievance-arbitration procedure. *Town of Wareham*, 26 MLC 206, 207 (2000).

In this case, the Town seeks to exclude the following positions as managerial: EMS Director, Health Agent, Treasurer/Collector, Library Director, CEDA Director, Town Accountant, and Director of Municipal Maintenance. After reviewing the job duties and responsibilities of these positions, we conclude that none of them meets the statutory criteria for a managerial employee.

The Town argues that the EMS Director, Treasurer/Collector, Library Director, and Director of Municipal Maintenance satisfy the first part of the statutory test by having the authority to adopt policies within their departments without receiving approval from the Interim Town Administrator. Although there is some evidence in the record to support the Town’s contention, other evidence belies this assertion. The record shows that the Interim Town Administrator screens the decisions of all these employees and approves their departmental expenditures.² The Acting Library Director sought the

1. Pursuant to the parties’ agreement, and for purposes of any clarification and amendment petition that the parties may subsequently file, we note that these vacant positions were not considered in this decision and certification.

2. Some of the job descriptions arguably support the Town’s contention that the department heads participate in policy formulation and implementation, yet specific evidence of the actual practice shows that the Interim Town Administrator retains enough control over their decisions that the department heads’ policy-making authority is not independent or substantial. See affidavits submitted by Mark Gifford, Susan Pizzolato, John Foster, and David Evans.

Interim Town Manager's approval to use library gift funds to cover a library budget line item, and for a policy regarding seasonal library patrons. In addition, a pending legal dispute currently inhibits her from bringing new or revised policies to the Library Trustees. Cf. *Town of Greenfield*, 32 MLC 154 (2006) (library director is a managerial employee because her budget and policy recommendations are not screened through another layer of management before presentation to the library trustees). Similarly, the Interim Town Administrator recently implemented a decision regarding Town snow plowing services without consulting the Acting Director of Municipal Maintenance. The Acting Director of Municipal Maintenance also brought the Interim Town Administrator a proposed sick leave abuse policy and a request to use surplus funds from a prior fiscal year. When the Treasurer/Collector sought to use the Massachusetts Collectors and Treasurers' Association Investment Policy Guide as a model for the Town, he brought that suggestion to the Interim Town Administrator for approval. These examples demonstrate that the incumbents in the disputed positions do not have unfettered authority to adopt policies within their department without the Interim Town Administrator's approval.

Further, the evidence does not show that the department heads are authorized to determine the public employer's objectives or participate in the policy decision-making process on a regular basis. The EMS Director directs EMS Department operations, but the last time that he made any written policy change was in the 1990s, and he sent that policy change to the Town Administrator for review and approval. Nor does the EMS Director's discretion to deploy staff and equipment show the requisite policy-making authority to be a managerial employee. See *Town of Dartmouth*, 29 MLC 204 (2003) (highway supervisor's responsibility to plan the use of manpower and equipment does not render him a managerial employee). The Treasurer/Collector has not drafted or established any payroll policies or procedures within his authority. Moreover, the evidence does not show that the policies that the Treasurer/Collector oversees—payroll, taxpayer inquires, and clerical employees' time off—are of significant import to the mission and objectives of the Town.

We next consider whether the employees in the disputed positions assist to a substantial degree in the preparation for or conduct of collective bargaining. The Town asserts that the EMS Director and the Library Director meet the criteria in the second part of the statutory managerial test because the Interim Town Administrator wishes to include them in future negotiations with unions representing employees in their respective departments. Citing *Town of Amesbury*, 25 MLC 7, 9 (1998), the Town asserts that an employee's absence from the bargaining process does not preclude a determination that they are managerial under the second part of the statutory test. Given the record before us, we reject this argument, and find that the Town's reliance on *City of Amesbury* is misplaced. Coverage under the Law is based on actual, not potential, duties and we decline to exclude employees from coverage under the Law based solely on an employer's representation that the incumbent will perform those duties at some future time. *City of Everett*, 27 MLC 147, 150 (2001). In *City of Amesbury*, the former Commission found that the police chief and fire chief exercised

substantial discretion in formulating policy and directing the operations of their departments and excluded them from the proposed bargaining unit because of their policy-making role in their respective departments. The chiefs' possible future participation in collective bargaining was not the primary basis for their exclusion. 25 MLC at 9. Here, there is insufficient evidence of policy-making authority to exclude the Library Director and the EMS Director from the unit under the first prong of the managerial test. Consequently, their potential involvement in future negotiations is immaterial.

Additionally, we do not exclude the Director of Municipal Maintenance from the unit based on the Acting Director's attendance at a single, post-petition negotiation session or his prior submission of general bargaining ideas to a former Town Administrator. The evidence describing this employee's level of participation at this session does not show that he participated to a substantial degree in conducting collective bargaining. *City of Boston*, 19 MLC 1050, 1066 (1992), explains that attendance at negotiations and caucuses alone is insufficient to render an employee managerial under the second part of the test of managerial status. Further, the evidence submitted regarding the Acting Director of Municipal Maintenance's transmission of ideas to a former Town Administrator depicts a consultative rather than substantial role in the collective bargaining process. See *Town of Manchester-by-the-Sea*, 24 MLC 76, 81 (1998) (identifying problem areas to discuss or merely consulting about bargaining proposals is insufficient to satisfy the second test of managerial status). Further, the evidence is insufficient to establish that the Town Accountant's role in costing out collective bargaining proposals satisfies the second part of the test, assisting to a substantial degree in preparing for or conducting collective bargaining. Although the Town submitted evidence that the Town Administrator worked with the Town Accountant regarding the Town's ability to fund proposals or items in a collective bargaining agreement, and the Town Accountant had calculated the cost of union proposals, he had not attended negotiations, drafted or reviewed proposals, or completed a full cost analysis of proposals. These facts show that the Town Accountant does not assist to a substantial degree in preparing for or conducting collective bargaining on behalf of the Town. Moreover, unlike the accountant in *Town of Manchester-by-the-Sea*, 24 MLC 76 (1998), whom the Board found to be a managerial employee, the Town Accountant here is not a member of the Town's negotiating team and does not participate in management team meetings or strategy sessions.

Finally, we find no basis to exclude the Health Agent or the CEDA Director as managerial employees. The Town does not argue that the Health Agent or the CEDA Director has a role in policy formulation or collective bargaining. Rather, the Town cites the Health Agent's ability to act with the authority of the Board in emergency situations and to file health violation complaints. These duties do not satisfy the statutory criteria for a managerial employee. The Board has previously held that a health agent who performed technical, inspectional, and enforcement duties was not a managerial employee because there was no evidence that the agent had a regular and significant role in policy formulation. *Town of Tisbury*, 30 MLC 77 (2003)). Here, neither the Selectmen's role in the daily

operations of the CEDA Department, nor the former CEDA Director's alleged unwillingness to acknowledge the Board's authority in CEDA departmental operations are statutory considerations for determining who is a managerial employee. *See Id.* Accordingly, the evidence is insufficient to establish that the EMS Director, Health Agent, Treasurer/Collector, Library Director, CEDA Director, Town Accountant, and Director of Municipal Maintenance should be excluded from the bargaining unit as managerial employees.³

Confidential Employees

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 Board has construed this statutory language to exclude those individuals 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 Medway*, 22 MLC 1261, 1269 (1995). Regular exposure to confidential material directly related to labor relations policy or other equally sensitive policy information while directly assisting an excluded employee is grounds for finding an employee confidential. *North Attleborough Electric Department*, 32 MLC 66 (2005).

The Town asserts that the CEDA Director, the Town Accountant, the Information Systems Manager, and the Technology Support Technician should be excluded from the bargaining unit as confidential employees. We disagree. The Town cites no case law holding that CEDA Director's participation in confidential negotiations with prospective developers and business interests requires the employee's exclusion from bargaining. Moreover, there is no evidence that this employee has access to confidential labor relations information. Mechanically calculating the cost of collective bargaining proposals is not a confidential function, and there is no evidence that the Town Accountant had any advance knowledge of the Town's actual bargaining position. *Millis School Committee*, 22 MLC 1081 (1995).

Further, the evidence is insufficient to exclude the Information Systems Manager and the Technology Support Technician as confidential employees. The Town states that the Information Systems Manager has access to all electronically stored confidential information, and that this information can include data that may be used in the formulation of bargaining proposals and electronic correspondence between the Town Administrator and the Selectmen on such subjects as collective bargaining strategy. However, this broad assertion, without more, does not show that the Information Systems Manager has access to the confidential labor relations material that requires his exclusion from the bargaining unit. *Town*

of South Hadley, 35 MLC at 134 (evidence submitted to exclude information technology director from bargaining unit insufficiently described what information existed on town computers, whether that information was confidential, and whether it concerned labor relations matters, management's position on personnel matters or advanced knowledge of the employer's collective bargaining proposals). The evidence also does not show whether there are safeguards or guidelines to restrict or track their access to electronic information. Any access that the Technology Support Technician has to CORI information, social security numbers, or criminal investigations does not render the employee confidential within the meaning of the Law. *See generally, Belchertown School Committee*, 1 MLC 1304, 1308 (1975) (access to sensitive financial data, personnel records or similar non-labor relations material alone does not make an individual a confidential employee). For all these reasons, we do not find these employees to be confidential.

Supervisory Employees

Historically, the Board has established separate bargaining units for supervisors and the employees whom they supervise, believing that employees who possess significant supervisory authority owe their allegiance to their employer, especially with respect to issues involving employee discipline and productivity. *Town of Bolton*, 25 MLC 62, 67 (1998). However, separate supervisory unit placement is a policy determination and not an express statutory command. *City of Boston*, MCR-06-5205, slip. op. at 46 (September 9, 2009). Consequently, the Board has declined to exclude a supervisor from a bargaining unit that included employees whom he supervised when the exclusion would create a one-person bargaining unit. *County of Dukes County/ Martha's Vineyard Airport Commission*, 25 MLC 153 (1999).

Here, the Town contends that certain positions should not be included in the same bargaining unit because they share a supervisory relationship. This argument affects the Chief Plant Operator and the Director of Municipal Maintenance.⁴ Although sound policy reasons favor separating supervisors from employees whom they supervise, as noted above, the Law disfavors single person bargaining units, and we therefore decline to create one here.

Authorization Cards for Vacant Positions

Finally, we consider the Town's argument that we should not count the authorization card for any employee who was separated from their employment after the Union filed the petition. The Town compares the Law's written majority authorization procedure with the representation election procedure and argues that the written majority authorization process does not give the Town the opportunity to challenge the voting eligibility of persons who are no longer employed. The Town argues that the Division should disqualify former employees from "voting" through the written majority authorization process because the written majority autho-

3. The evidence does not show that any of the department heads acts in an appellate capacity in the administration of a collective bargaining agreement or in personnel administration.

4. At the time that the Town filed its challenges, there were five supervisory relationships affected. Subsequent agreements between the Town and the Union have reduced the number of supervisors and supervisees in the petitioned-for bargaining unit to one.

ization process does not account for the attrition of employees through the passage of time.

We do not agree with the Town. Section 4 of the Law gives employees separate avenues by which they may select an exclusive representative, and the procedures for each pathway need not be identical. Moreover, the path of written authorization does not preclude the employer from raising a timely challenge to composition of the bargaining unit based on an attrition argument. First, it should be noted that pursuant to 456 CMR 14.19(6), only employees who are employed on the filing date of the petition are eligible for inclusion on the list described in Rule 14.19(5). Therefore, any employee who signed a card and subsequently was lawfully separated from employment before the time the list was filed would not be properly included on the list. Once that list has been filed with the neutral (in this case, the Division), either party has three days to file a challenge "to the inclusion or exclusion of a name on the list." 456 CMR 14.19(6). Challenges based on an attrition argument would at this point be properly considered. This three-day challenge period for inclusion or exclusion of employees is also consistent with Rule 14.19(7), which requires that any challenge to the validity of the written majority authorization be filed within three days of the selection or designation of the neutral. Absent any timely filed objections, the Division will determine if the majority of employees on the list have signed cards even if some of those employees lose or leave their job after the petition's filing date. 456 CMR 14.19(8).⁵ Accordingly, contrary to the Town's position, the written majority authorization process does address attrition among card-signers and enables an employer to file written challenges to the process, as long as those challenges are filed within three days of the selection of the neutral. An open-ended window of challenge, as the Town seems to be seeking here, based on future changes to the workforce, or an automatic exclusion of other validly signed authorization cards due to attrition of the work force, whether by layoff, voluntary separation or termination, is contrary to the existing regulations and moreover, would frustrate the rights of those employees who are entitled to rely on their petition for certification at the time they submit it to the designated neutral.

Conclusion

For the foregoing reasons, we find that the EMS Director, Health Agent, Information Systems Manager, Technology Support Tech-

nician, Treasurer/Collector, Library Director, CEDA Director, Town Accountant, and Director of Municipal Maintenance should not be excluded from the petitioned-for bargaining unit as confidential or managerial employees. Consequently, we direct the Division of Labor Relations to verify the evidence of written majority status that the Union submitted for the following positions: EMS Director, Health Agent, Information Systems Manager, Technology Support Technician, Treasurer/Collector, Library Director, CEDA Director, Town Accountant, Director of Municipal Maintenance, Harbormaster, Building Director Inspector, Chief Plant Operator, and Director of Assessment.

SO ORDERED.

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5. Rule 14.19(5) states in part:

Immediately upon selection of an outside neutral or designation of the Division as neutral and in no event later than three days from selection or designation, the employer shall provide the neutral with a list containing the full names and titles of employees in the proposed unit. If the employer does not supply this information to the neutral within the specified timeframe, the neutral shall determine the sufficiency of the written majority authorization based upon information provided by the employee organization.

Rule 14.19(6) states:

Employees eligible for inclusion on the list referred to in 456 CMR 14.19 shall be employees who were employed on the filing date of the petition for written majority status. Any challenges to the inclusion or exclusion of a

name on the list shall be filed by the employee organization or the employer with the neutral within three days of the presentation of the list to the neutral.

Rule 14.19(7) states:

Any challenges to the validity of the written majority authorization shall be filed with the neutral immediately upon his/hers/its selection or designation and in no event later than three days from the selection or designation.

Rule 14.19(8) states:

As part of the verification process... the neutral shall determine whether a majority of employees on the list referred to in 456 CMR 14.19(5) have signed valid written majority authorizations and whether there are a sufficient number of challenges referred to in 456 CMR 14.19(6) and (7) to affect the result...