

## In the Matter of FALL RIVER HOUSING AUTHORITY

and

AFSCME, COUNCIL 93, AFL-CIO

Case Nos. MUP-06-4798, MUP-07-5006, and CAS-06-3651

15.	<i>Supervisory and Managerial Employees</i>
17.1	<i>confidential employee</i>
34.2	<i>community of interest</i>
34.91	<i>accretion</i>
35.2	<i>confidential employees</i>
35.7	<i>supervisory and managerial employees</i>
54.5121	<i>creating new position</i>
54.589	<i>bargaining unit work</i>
54.66	<i>bargaining over newly created position</i>
67.165	<i>bargained to impasse</i>
67.66	<i>altering bargaining unit</i>
67.82	<i>implementing changes after impasse</i>

April 4, 2011

Susan L. Atwater, Hearing Officer

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Housing Authority

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93, AFL-CIO

## HEARING OFFICER'S DECISION AND ORDER

## SUMMARY

This case presents the following issues: 1) whether the Fall River Housing Authority (Housing Authority or Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by unlawfully transferring bargaining unit work to non-bargaining unit members; and 2) whether the newly-created position of Senior Property Manager should be accreted to one of the Housing Authority's two bargaining units. I find that the Employer did not unlawfully transfer bargaining unit work to non-bargaining employees, and I direct the Senior Property Managers be accreted to Unit B, the supervisory bargaining unit.

## STATEMENT OF THE CASE

On September 22, 2006, AFSCME, Council 93, AFL-CIO (Union) filed a clarification and amendment (CAS) petition with the former Labor Relations Commission (Commission)<sup>1</sup> seeking to accrete the newly-created non-unit Senior Property Manager position into the Union's bargaining Unit A. On October 30, 2006, the Union filed a charge with the Commission, alleging that the

Housing Authority had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by creating and posting the Senior Property Manager positions. The Commission docketed the charge as Case No. MUP-06-4798. On July 6, 2007, the Union filed a related charge which the Commission docketed as Case No. MUP-07-5006.

Pursuant to Section 11 of the Law and Section 15.04 of the Rules in effect prior to November 15, 2007, the CERB investigated the charges and the CAS petition and issued a complaint of prohibited practice that consolidated all three cases. The Employer filed an answer to the complaint on October 5, 2009.<sup>2</sup> I conducted a hearing on May 3, May 20 and July 6, 2010, at which both parties had the opportunity to be heard, to examine witnesses and to introduce evidence.<sup>3</sup> The Employer and the Union filed timely post-hearing briefs. Based on the record evidence, which includes witness testimony, stipulations of fact, and documentary exhibits, and in consideration of the arguments that the parties made in their opening statements and post-hearing briefs, I make the following findings of fact and render the following opinion.<sup>4</sup>

## STIPULATIONS OF FACT

## PARTIES &amp; BACKGROUND

1. The Fall River Housing Authority ("Authority") is a public employer within the meaning of Section 1 of the Law.
2. The American Federation of State, County and Municipal Employees, Council 93, AFL-CIO ("Union") is an employee organization within the meaning of Section 1 of the Law.
3. In 1971, in Case No. CR-3294, the former Labor Relations Commission certified the Union as the exclusive representative of the following bargaining unit of employees employed by the Housing Authority:
 

All clerical employees in the Fall River Housing Authority including secretaries, tenant-selector, accountants, assistant accountants, receptionist, clerk-cashiers, managers, Assistant Leased Housing Officer, excluding the leased housing office, the general housing manager coordinator, director and assistant director.
4. At all relevant times, Thomas Collins [Collins] was the Executive Director of the Authority. He had held this position for approximately five and one-half years.
5. At all relevant times, Dan McDonald [McDonald] was the Deputy Executive Director of the Authority. He has held this position for approximately fourteen years.
6. Wayne Souza [Souza] is currently employed by the Authority in the position of Maintenance Foreman Leader. He has held this position since 2006. Mr. Souza has been employed by the Authority

1. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (CERB) is the body within the Division charged with deciding adjudicatory matters.

2. The Union subsequently withdrew Count II of the complaint.

3. The parties agreed to leave the record open following the hearing for receipt of certain additional joint documentary exhibits. I closed the record on August 10, 2010.

4. Pursuant to Standing Order 2009-1, the CERB designated hearing officers to preside over hearings and decide the allegations set forth in complaints for prohibited practice charges filed on or before November 14, 2007.

since November 19, 1984. Mr. Souza has held various offices within the Union's bargaining unit. He served as Vice President from 1998 until 2001. In 2001, Mr. Souza was elected to serve as President of the Union's bargaining unit. He held that position until February 2007.

7. Beverly Roberts is currently employed as a Custodian/Asbestos Removal for the Authority. Ms. Roberts is a member of the Union's bargaining unit and has been employed with the Authority for approximately twenty-eight years. Ms. Roberts formerly held the title of Property Manager for approximately fifteen years.

8. Debra Morrissette [Morrissette] is currently employed as a Senior Property Manager since said position was created in 2006. Prior to that Ms. Morrissette held the position of Property Manager for approximately thirteen years. She has been employed with the Fall River Housing Authority since 1991.

9. Lorie Ras is currently employed as a Senior Property Manager since said position was created in 2006. Prior to that Ms. Ras held the position of Property Manager for eleven years.

*NEGOTIATIONS FOR THE APRIL 12, 2006 COLLECTIVE BARGAINING AGREEMENT*

10. At some point during calendar year 2005, the Authority and the Union entered into negotiations for a successor collective bargaining agreement. Originally, the Fall River Housing Authority did not include removing the Property Managers from the bargaining unit as part of their proposals as it agreed, along with the Union, that these should be separate from the successor negotiations. However, in September of 2005, Mediator Jamie Kelly [Kelly] suggested the parties expand their list of proposals and at that point, for the first time, the removal of said Managers from the bargaining unit became part of the Authority's proposal. During subsequent mediation sessions, it was agreed by the parties again to keep the issue of removing said manager positions from the Union separate from the successor negotiations and by January 2006 was totally removed from the Authority's proposal as originally intended.

11. The Authority and the Union reached agreement on a successor contract on April 12, 2006.

12. Prior to the execution of the April 12, 2006 collective bargaining agreement, the position of Property Manager had always been included in bargaining unit A.

*THE CONDUCT OF THE PARTIES AFTER APRIL 12, 2006*

13. Shortly after the parties executed the settlement agreement on April 12, 2006, Mr. Souza was called into a meeting with Director Collins and Deputy Director McDonald to discuss the creation of the new Senior Property Manager positions.

14. This meeting occurred in Deputy Director McDonald's office. Mr. Souza brought with him then Vice President Paul Reagan.

15. This meeting lasted approximately a half hour. During this meeting the Authority expressed its desire to have the new position be a non-bargaining unit position.

16. The Union believed that the position should be placed within its bargaining unit.

17. The same individuals met approximately two more times to discuss this issue.

18. On August 10, 2006, [Collins] sent a memo to the Authority Board of Commissioners stating in pertinent part:

Please find attached a job description for the new position of property manager. This non-union position is being created in response to the Housing Authority's move towards asset management.

\* \* \*

It is my desire to post in-house three property manager positions... With the creation of the new property manager position, it is not my intention to backfill any of the existing housing manager's positions should any of our existing managers qualify for and accept the new property manager positions.

19. On or about April 3, 2007 and April 26, 2007, the Employer posted two non-Union Senior Property Manager positions.

20. The decision to transfer bargaining unit work to non-bargaining unit employees and the impacts of that decision are mandatory subjects of bargaining.

21. The following duties of the Senior Property Managers were previously performed by the Property Managers:

- Ensure that resident records, leases and services are monitored and maintained according to agency policies and procedures.
- Responsible for intake of residents including initial rent calculation, orientation, lease execution, and all aspects of initial occupancy. (Lorie does not do this, however, Deb does due to staff shortage.)
- Responsible for recertification.
- Perform annual inspection.
- Responsible for assessing resident charges.
- Responsible for enforcing lease; scheduling conferences, dealing with complaints and meeting with residents.
- Responsible for eviction of tenants who do not meet their obligations as contained in FRHA lease and applicable HUD and DHCD [Department of Housing and Community Development] regulations.
- Maintaining records.
- Assists residents, either directly or via referral, with social services, employment, financial, health problems, etc...
- Assure that site, buildings are in safe, decent, sanitary condition as well as being in good repair.

22. The following duties of the Senior Property Managers were not previously performed by the Property Managers:

- Verify recertification vs. interviewing and completion.
- Assign maintenance to conduct ground, building and common area inspections, as well as coordinate with Modernization for capital improvements.
- Senior Property Managers are CORI certified and can determine [a] course of action based on police reports, HUD regulations and lease requirements. Senior Property Managers have express control over the recommendation to terminate tenancy. In the past, this decision was determined by the Director of Management office.

- Monitors the preparation of all vacant units by determining [the] level of work to be performed, staff assignments, requesting trade employees, outside contractors, and determining the time frame to complete the unit. We are solely responsible for the work performed and the release of [the] unit for tenancy. We also have to determine the cost effective method of turning around the unit for occupancy. Example: Should we use own staff or outside contractor to complete the work: Also, is work in unit maintenance responsibility or union trade work as outlined by job description and collective bargaining agreement, in addition we must ensure that work completed is in compliance with all state, city and federal codes (sic).
- Determining and approving vacation schedules for all staff including maintenance and clerical (Exhibit 3).
- Approving purchasing for all assigned sites (Exhibit 4).
- Authorizing and appro[ving] service requisitions for outside vendors (example; outside plumbing services, painting, tree removal, parking lot lining.) In addition, we verify work has been completed and authorize payment.
- Authorized to review police reports and CORI records. Certified by CHBS [Criminal History Systems Board] which enables us to request a CORI check.
- Responsible for monthly operating budget. Conduct financial assessments, monitor spending, review funding received and review operating costs.
- Authorized to direct work force as we deem necessary by site assignments.
- Determin[e] if a new hire has successfully completed their trial and training period.
- Responsible for the progressive disciplinary action of employees. The independent disciplinary authority of the Senior Property Managers is limited to issuing verbal and written warnings to employees in bargaining Unit A. We are also now the 1<sup>st</sup> step of the grievance process by being the supervisor.<sup>5</sup>
- Senior Property Managers are responsible for [the] maintenance staff. In the past, maintenance was supervised by the Superintendent of Maintenance and the Assistant Superintendents of Maintenance who are non-union employees.
- Participates in collective bargaining and recommends changes in the collective bargaining agreement. The Senior Property Managers are not present at the table during collective bargaining negotiations.
- Assists and creates policy for the Fall River Housing Authority, including but not limited to:
  - 1) ACOP [Admissions and Continued Occupancy Policy] (Exhibit 8)
  - 2) Violence against Women Act (Exhibit 9)
  - 3) Community Service Policy (Exhibit 10)
  - 4) Rent Collection policy (Exhibit 11)
  - 5) Work Order Policy (Exhibit 12)
  - 6) Dress Code Policy (Exhibit 13)
  - 7) Resident Handbook (Exhibit 14)
  - 8) Application for Continued Occupancy (Exhibit 15)

- Attend weekly department head meetings and as well as month[ly] budget meetings.
- Deal with employee confidential matters.

23. Employer Exhibits 1, 3, 4, 5, 6, 7, 8, and 10 were in existence prior to the creation of the Senior Property Manager position.

24. The Union represents the employees of the Fall River Housing Authority in two separate bargaining units:

Unit A includes clerical and maintenance employees, and

Unit B includes supervisory employees.<sup>6</sup>

#### FINDINGS OF FACT

##### *The Organizational Structure of the Housing Authority*

The Fall River Housing Authority operates a public housing program in the City of Fall River in accordance with state and federal law and U.S. Department of Housing and Urban Development (HUD) regulations. A Board of Commissioners (Board) oversees the Housing Authority. Executive Director Collins reports directly to the Board. Collins supervises Deputy Executive Director for Operations and Technology McDonald, and McDonald supervises, among other positions, the Director of Field Operations. The Director of Field Operations supervises the State and Federal Portfolio Managers, and the State and Federal Portfolio Managers supervise the Senior Property Managers. The Senior Property Managers oversee specific housing sites and supervise the Property Managers, Assistant Property Managers, Clerks, and Maintenance staff who work at their housing sites.<sup>7</sup>

The employees of the Housing Authority are organized into two bargaining units, Unit A and Unit B. Unit A is comprised of clerical and maintenance employees, including the Property Manager position that predated the Senior Property Manager position. Unit B is comprised of the following supervisory positions: Computer System Supervisor, Assistant to the Director of Housing, Development & Support Services, Elderly Services Coordinator, Coordinator of Resident Services, Secretary to the Deputy Executive Director, Coordinator of Housing Assistance, Purchasing Agent/Warehouseman, Coordinator of Tenant Selection, and Supervising Senior Accountant.

In 2006, the Housing Authority began to restructure its operations in response to new HUD regulations. Up to this point, the Housing Authority had a centralized organizational and financial structure and pooled all of the money that it received from various sources. Collins, McDonald, and the Housing Authority's Chief of Finance managed the Housing Authority as a single entity and made all of the operational and financial decisions. The Housing Authority understood the new HUD regulations to require decentralization into smaller, self-sustaining entities known as "Asset Management Projects" (AMPs). AMPs are groups of state or federal hous-

5. This stipulation regarding the Senior Property Managers' role in the grievance process conflicts with McDonald's testimony. I resolve this inconsistency by deeming the stipulation to be true and accurate.

6. The parties' signed stipulations listed this paragraph as number 11.5.

7. The position of Property Manager remained on the organizational chart after the Employer created the Senior Property Manager position, but there is no evidence that anyone filled these positions after the Property Managers were hired into the Senior Property Manager positions.

ing developments that have their own staff, budget, and spending authority, and are funded and evaluated separately by HUD. Collins and McDonald believed that the AMP structure required the Housing Authority to create a new position that would possess the authority and autonomy to independently manage the AMPs.

*The Creation of the Senior Property Manager Position*

In September of 2005, the parties began to negotiate a successor to their existing collective bargaining agreement. During the negotiations, the Employer proposed to remove the Property Manager position from Unit A and expand the position duties to include overall responsibility for the operation of an AMP. As noted in the joint stipulations, Mediator Kelly suggested that the parties add this issue to the negotiations, and the parties agreed to do so. Subsequently, the parties removed the Property Manager unit placement issue from the successor negotiations. The parties reached agreement on a successor contract on or about April 12, 2006.

In April of 2006, following the conclusion of the successor negotiations, Collins contacted then Union President Souza and asked Souza to attend a meeting that day with Collins and McDonald.<sup>8</sup> Souza attended the meeting along with then Union Vice President Reagan. At the meeting, which lasted approximately thirty minutes, McDonald and Collins told Reagan and Souza that the way to meet HUD's asset based management goals was to remove the Property Manager positions from Unit A and designate them as Senior Property Managers. Collins and McDonald explained the rationale and background for the proposal, and the parties discussed it. The parties also discussed the duties that the Property Managers had performed and the duties of the proposed new positions. Collins and McDonald did not present any other options to Reagan and Souza, and Reagan and Souza presented no alternatives to Collins and McDonald. Souza and Reagan told Collins and McDonald that they did not want the Property Manager positions removed from the unit, noting that the unit had already lost positions, and the meeting ended at that point.

Collins and McDonald met with Reagan and Souza again on an unspecified date. Collins and McDonald described how the proposal to remove the Property Manager positions stemmed from HUD's asset-based management regulations and told the Union where they could access the HUD regulations. Collins and McDonald suggested ways to minimize the impact on the unit, such as creating additional positions to make up for the lost positions. The Union listened to the Employer's proposal, but reiterated that the Property Managers should stay in the unit. The Union did not want to entertain the Employer's proposal to remove the position from the unit and did not seriously consider allowing the Employer to do so. When Collins and McDonald stated that they had to remove the positions from the unit, Souza and Reagan responded that the Union would "do what it had to do." The parties met a third time on this issue, but there is no evidence of when the parties held this

meeting or what the parties discussed. Ultimately, the parties never agreed on any aspect of removing the Property Manager positions from Unit A.

In or about August of 2006, Collins drafted a job description for the new position and shared it with the Union.<sup>9</sup> The Employer posted the position in August as a non-union position and amended the posting in April of 2007. Employees who had held Property Manager positions subsequently applied for and received the Senior Property Manager positions.

*The Property Manager Position*

Property Managers supervised and enforced all managerial-related activities at the site level involving lease enforcement, rent collections, record keeping, and compliance with all HUD and Department of Housing and Community Development rules and regulations and Housing Authority policies. Generally, they responded to resident service requests and the overall management of the property to assure safe, decent, and sanitary housing.

The Property Managers' responsibilities included limited authority over the maintenance and clerical staff at their housing sites. Property Managers completed performance evaluations for clerical employees and could discipline maintenance and clerical employees up to the level of a verbal reprimand. However, the Property Managers could not direct the work of the clerical or maintenance staff, authorize paid leave time to employees, or require employees to work overtime. Property Managers had no role in collective bargaining. Because McDonald, Collins, and the Chief of Finance pooled all revenue and made all of the Housing Authority's financial decisions, the Property Managers had no financial or budgetary responsibilities for their sites.

*The Senior Property Manager Position*

*General Responsibilities*

The Senior Property Manager oversees all staff, finances, and daily operations at their assigned AMP. The job description<sup>10</sup> states that the Senior Property Manager performs the following essential duties (among others):

Prepares and implements the annual operating budget for each property. Provides monthly reporting to either the Federal or State Portfolio Manager regarding budget projections, operating expenses, and tenant accounts receivable.

Supervises property-level administrative and maintenance staff including evaluating the performance of personnel and taking progressive disciplinary action where warranted and in accordance with collective bargaining agreements.

Participates in collective bargaining and recommends changes to the collective bargaining agreement.

Participates in formulation of management policies relating to staff assignments, operation of sites, and financial management of the resources under their direct control.

8. The Employer and the Union typically scheduled meetings in an informal manner. If Collins or McDonald wished to discuss an issue with the Union, they would telephone Souza and ask to meet. Likewise, if Souza wished to discuss an issue with the Employer, he would stop in and ask to speak with McDonald and/or Collins.

9. There is no evidence of any discussions over the job description.

10. The parties submitted the Senior Property Manager job description as a joint exhibit.

Will oversee purchasing for developments within his/her responsibility. Within established budget parameters, will coordinate purchase of all administrative and routine maintenance supplies sufficient to effectively manage each development on a daily basis.

The Senior Property Managers have more autonomy and authority over their AMPs than the Property Managers had over their sites. The primary differences between the two positions involve the Senior Property Managers' responsibility and authority to: 1) determine the maintenance needs of an AMP, including whether to assign work to the Housing Authority's maintenance staff or contract it to an independent contractor; 2) participate in developing the AMP's budget; 3) spend budgeted money; 4) discipline employees under their supervision; and 5) participate in the collective bargaining process. The specific differences in their duties are listed in Stipulation No. 22. In connection with their responsibilities, the Senior Property managers are privy to employee personnel files and resident CORI information.

The Senior Property Managers perform different duties than the other positions in Unit B, but they work along side of Unit B members. Like the Unit B members, the Senior Property Managers perform supervisory duties, such as: issuing written reprimands,<sup>11</sup> evaluating employees,<sup>12</sup> and coordinating and authorizing paid leave and overtime. Pursuant to a Housing Authority Personnel Policy, the Senior Property Managers receive the same sick and vacation leave benefits that Unit B members receive. Additionally, the Senior Property Managers and the Unit B members generally work a Monday through Friday work schedule.<sup>13</sup>

#### Budgetary Responsibility

The Senior Property Managers participate in developing the budget for their AMP. The budget process begins with a draft budget that the Director of Finance and the Asset Management Account Supervisor issue that contains projected fixed costs, like fire and liability insurance, health insurance and retirement contributions, telephone charges, rents, administrative expenses, and maintenance materials. This draft budget goes to the Director of Field Operations, who reviews it with a Senior Property Manager. The Director of Field Operations and the Senior Property Manager then build a budget for their AMP that incorporates expenses and available funding. When the AMP budget is complete, it goes to the Director of Finance, McDonald, Collins, and the Board for approval.

Once the budget is finalized, the Senior Property Managers manage their AMP within the established budgetary parameters. The Director of Finance must approve changes in the budget. Part of the Senior Property Manager's responsibility for managing an AMP includes authorizing and coordinating purchases and deciding whether needed maintenance should be performed by the Unit A maintenance staff or by an outside contractor.

#### Policy-Making Responsibilities

The Board sets the Housing Authority's broad goals and policies. Senior Property Managers do not independently create or implement policies, but they participate in the policy-making process by recommending new policies or changes to existing policies. For example, the Senior Property Managers participated in drafting a new Violence Against Women Act (VAWA) policy that protects female tenants residing in housing units. The policy originated with a HUD directive, and HUD guided the policy-development process. The Senior Property Managers worked on the VAWA policy as part of a task force that included the Federal Portfolio Manager. After the task force drafted the policy, Collins and McDonald reviewed it, and the Board adopted it.

The Senior Property Managers also participated in modifying the Housing Authority's Community Service Policy. HUD regulations prompted the Housing Authority to revise the Community Service Policy, and the Senior Property Managers collaborated with the Federal Portfolio Manager on its revision. The Director of Field Operations, McDonald, Collins and the Board reviewed and approved the policy.

At the Employer's request, Morrisette drafted Work Order and Rent Collection guidelines and a handbook for Housing Authority residents. Morrisette forwarded her completed drafts to the Director of Field Operations for his review and approval.<sup>14</sup>

#### Collective Bargaining Responsibilities

The Senior Property Managers participate in the development of collective bargaining proposals by recommending new proposals or revised contract language to Collins and McDonald. The Senior Property Managers are not members of the Housing Authority's bargaining team, do not attend the negotiations, and do not possess the authority to approve a proposal. However, they attend meetings with other senior staff members prior to the negotiations and discuss the Housing Authority's collective bargaining goals, objectives, positions, and funding expectations. Subsequently, Collins, and McDonald, and the Housing Authority's attorney develop the specific proposals that the Employer will offer at the negotiations.

Senior Property Managers also attend and participate in periodic senior staff/department head meetings that include Collins, McDonald, the Director of Field Operations, the Director of Facilities Management, and the State and Federal Portfolio Managers. The attendees at these meetings discuss a variety of issues including the Housing Authority's financial condition and projections.

11. The Senior Property Managers cannot impose discipline higher than a written reprimand.

12. The Senior Property Managers' evaluations do not affect the wages of the employees whom they evaluate.

13. Unlike the Unit B members, the Senior Property Managers have a flexible schedule that enables them to work evenings or weekends.

14. Morrisette's guidelines and handbook applied to a limited number of AMPs.

## OPINION

*The Prohibited Practice Charge*

An employer must bargain with the exclusive representative of its employees before transferring work that traditionally has been performed by bargaining unit employees to non-unit personnel. *City of New Bedford*, 15 MLC 1732, 1736 (1989). To determine whether an employer has unlawfully transferred bargaining unit work, the CERB considers the following factors: 1) whether the employer transferred bargaining unit work to non-unit personnel; 2) whether the transfer of unit work to non-unit employees has an adverse impact on either individual employees or the unit itself; and 3) whether the employer gave the bargaining representative prior notice and an opportunity to bargain over the decision to transfer the work. *Commonwealth of Massachusetts*, 27 MLC 52, 55 (2000), *aff'd sub nom.*, *Commonwealth of Massachusetts v. Labor Relations Commission*, 60 Mass. App. Ct. 831, 833 (2004).

The Housing Authority acknowledges that the Senior Property Managers perform certain duties that the Property Managers previously performed,<sup>15</sup> and does not dispute its obligation to bargain over the decision to transfer bargaining unit work. The loss of bargaining unit positions and work adversely impacted the bargaining unit, since the Employer decided not to fill the Property Manager positions after it created the Senior Property Manager positions and staffed them with former Property Managers. The Employer gave the Union notice at the 2005 successor negotiations of its proposal to create the new positions and transfer some of the work, and the parties bargained over the issue at three subsequent meetings. The parties did not resolve the issue, and thus, the only remaining question is whether the parties bargained to impasse.

To determine whether the parties have reached impasse, the CERB considers the bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issues to which there is disagreement, and the contemporaneous understanding of the parties concerning the state of the negotiations. *Town of Westborough*, 25 MLC 81, 88 (1997). The CERB will determine that the parties have reached impasse only where both parties have bargained in good faith on negotiable issues to the point where it is clear that further negotiations would be fruitless, because the parties are deadlocked. *Commonwealth of Massachusetts*, 25 MLC 201, 205 (1999). The ultimate test is whether there is a likelihood of further movement by either side and whether the parties have exhausted all possibility of compromise. *City of Boston*, 28 MLC 175, 184 (2001).

I find that the parties reached impasse. After separating the issue from the successor bargaining negotiations, the Union and the Employer met three times to discuss removing the Property Manager position and work from Unit A. Because they had addressed the issue during the negotiations, both parties were familiar with the issue and the rationale behind it. The Housing Authority and the Union steadfastly maintained their original positions at the first two sessions, and there is no evidence that they subsequently altered their views. There is no evidence that either party bargained in bad

faith at any point. There were no changed circumstances that could have prompted a new outlook, *see Commonwealth of Massachusetts, supra*; no change in the Employer's proposal that could have generated new avenues of discussion; *see Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 14 MLC 1518 (1988), no new potential created by the passage of time; *see City of Lawrence*, 3 MLC 1304 (1976), and no evidence that the Union voiced a desire to continue the negotiations. *See City of Boston*, 21 MLC 1350 (1994). The Union consistently stated that it did not want to lose the unit positions; it presented no alternatives or counterproposals, and the Employer's offer to create new positions within Unit A did not spark a change in the Union's view. At the second meeting, the Union told the Employer that the Union would "do what it had to do," and at the hearing, Souza testified that the Union did not seriously consider the Employer's proposal. In sum, the evidence shows no possibility that either party would or could present a proposal that would move them toward resolution and demonstrates that the parties were deadlocked. *See City of Boston*, 28 MLC at 184. Therefore, the Employer did not violate the Law when it transferred bargaining unit work from Unit A to the non-unit Senior Property Managers.

*The Accretion Petition*

The issue presented by the Union's accretion petition is whether the Senior Property Manager positions should be accreted to one of the Union's two bargaining units. The Union's original petition sought to place the Senior Property Managers in Unit A. However, the Union amended its petition during the litigation and now seeks to place the Senior Property Managers in Unit B. However, before addressing the accretion question, I consider the Employer's argument that the Senior Property Managers should be excluded from either bargaining unit as confidential and/or managerial employees.

## 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. *See Wellesley School Committee*, 1 MLC 1299, 1401 (1975), *aff'd sub nom. School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112 (1978).

15. Stipulation No. 21 describes the transferred work.

The policy decisions must be of major importance to the mission and objectives of the public employer. *Wellesley School Committee*, 1 MLC at 1403. 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. See *Worcester School Committee*, 3 MLC 1653, 1672 (1977).

The Employer argues that the Senior Property Managers' role in policy development satisfies this criterion. I disagree, because all of the Senior Property Managers' policy-related work results from a collaborative process and/or undergoes multiple layers of review. There is no evidence that the Senior Property Managers drafted or implemented any policy that McDonald and Collins did not previously approve.

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. The Employer argues that the Senior Property Managers satisfy this managerial test because they participate in meetings where collective bargaining proposals are drafted. However, employees are not managerial if they merely identify problem areas to discuss during bargaining or consult about bargaining. *University of Massachusetts*, 32 MLC 186, 191 (2005). Instead, 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. The Senior Property Managers discuss the Housing Authority's collective bargaining goals and positions at senior staff meetings, and they recommend proposals to McDonald and Collins in preparation for bargaining. However, they have an advisory, rather than an authoritative role in bargaining. They are not on the bargaining team, they do not formulate proposals, and they have no role in strategy development or settlement. Therefore, they do not meet the second part of the managerial test.

To be classified as a managerial employee under the third statutory test, an employee must exercise discretion without consultation or approval. *Id.* 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). The Employer argues that the Senior Property Managers satisfy this statutory criterion because they possess the authority to discipline employees under their supervision. This argument is not persuasive because supervisory responsibilities do not confer managerial status. See *City of Worcester*, 2 MLC 1041 (1975); *Town of Agawam*, 13 MLC 1364 (1986). Additionally, the Senior Property Managers' Step 1 grievance authority does not confer managerial status, and there is no evidence that they exercise appellate authority in any area.

#### Confidential Employees

The Employer next argues that the Senior Property Managers should be excluded from collective bargaining as confidential employees. Section 1 of the Law defines a confidential employee as one who "directly assists and acts in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter." This statutory language excludes 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). Further, employees who have significant access or exposure to confidential information concerning labor relations matters, management's position on personnel matters, or advance knowledge of the employer's collective bargaining proposals are excluded as confidential. *Fall River School Committee*, 27 MLC 37, 39 (2000).

The Employer contends that the Senior Property Managers are confidential employees because they attend meetings where the Housing Authority discusses collective bargaining goals and because they have access to resident CORI records and employee personnel records. The Employer cites no case holding that employee access to CORI records and employee personnel records renders an employee "confidential" within the meaning of the Law, and the CERB has held otherwise. *Town of Wareham*, 36 MLC 76, 79 (2009); *Belchertown School Committee*, 1 MLC 1304, 1308 (1975).

Further, the Senior Property Managers' access to information regarding the Housing Authority's collective bargaining goals, objectives, financial condition and projections is insufficient to exclude them from collective bargaining. An employee will be excluded as a confidential employee if they have access to all or substantially all of the bargaining proposals prior to their submission to the union, or where their access to financial information would make it obvious what the employer would offer during negotiations. *Millis School Committee*, 22 MLC 1081 (1995).

Here, the Senior Property Managers do not have advance notice of the Housing Authority's proposals. While the Senior Property Managers suggest new or revised contractual language or new proposals to Collins and McDonald, Collins and McDonald formulate the Housing Authority's actual proposals later with the Employer's attorney. Moreover, the evidence did not show that the financial information discussed at the senior staff meetings would necessarily alert the Senior Property Managers to the Employer's bargaining position. Accordingly, I find that the Senior Property Managers are not confidential employees and should be placed in a bargaining unit with other employees with whom they share a community of interest.<sup>16</sup>

16. I also note that the Senior Property Managers report directly to the State and Federal Portfolio Managers, and there is no evidence that the State and Federal Portfolio Managers are excluded from coverage under the Law.

*Unit Placement*

A unit clarification petition is the appropriate procedural vehicle to determine whether newly-created positions should be included or excluded from a bargaining unit and to determine whether substantial changes in the job duties of an existing position warrant its exclusion or inclusion from the bargaining unit. *Town of Athol*, 32 MLC 50 (2005). To determine whether a position should be accreted into an existing bargaining unit, the CERB considers three factors: 1) whether the position was included in the unit at the time that 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. *Town of Somerset*, 25 MLC 98, 100 (1999).

In this case, the first two factors are inconclusive. The Housing Authority created the new Senior Property Manager positions after the former Commission certified the bargaining unit in 1971. The bargaining history demonstrates that the Union and the Employer discussed the unit placement issue at the negotiations in 2005 but did not resolve the issue. Thus, I must determine whether the Senior Property Managers share a community of interest with the positions in Unit B.<sup>17</sup>

To determine whether employees share a community of interest, the CERB considers factors including: 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). Like the members of Unit B, the Senior Property Managers are supervisory employees. Although they have different job duties than the other members of Unit B, the Senior Property Managers work along side many employees working in Unit B positions. The Senior Property Managers and Unit B members receive the same sick and vacation leave benefits, and the Senior Property Managers and the Unit B members generally work a Monday through Friday work schedule. Taken as a whole, this evidence establishes that the Senior Property Managers share a community of interest with the members of Unit B.

The Employer argues that the Senior Property Managers should not be placed in any bargaining unit that the Union represents because their duties could conflict with the interests of the Union and

the bargaining unit members. Specifically, the Employer notes that the Senior Property Managers: 1) could need representation by Union officers whom they supervise; 2) participate in meetings discussing potential collective bargaining proposals; and/or 3) can decide to contract out Unit A maintenance work. The CERB recognizes the potential for conflict in this scenario and, for this reason, generally places supervisors in a different bargaining unit from the employees whom they supervise. *West Boylston Water District*, 25 MLC 150, 152 (1999). Placing the Senior Property Managers in supervisory Unit B will avoid some of the cited concerns. While others may still exist, depending on the Union's organizational structure and representational procedures, I decline to permit potential conflicts to defeat the Senior Property Managers' collective bargaining rights. Unions frequently represent bargaining unit members with varying or conflicting needs, see *Marion Town Employees Association*, 35 MLC 173, 177 (2009), and there is no reason to question whether the Union will represent the Senior Property Managers fairly in compliance with its statutory obligation.

## CONCLUSION

Based on the record and for the reasons explained above, I conclude that: 1) the Fall River Housing Authority did not unlawfully transfer bargaining unit work to non-bargaining employees; 2) the Senior Property Managers are not managerial or confidential employees; and 3) the Senior Property Managers should be accreted to supervisory bargaining Unit B.

## SO ORDERED.

## APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Division of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.

\* \* \* \* \*

17. Because the Union argues that the Senior Property Managers should be accreted to Unit B, and I find that they share a community of interest with members of Unit B, I need not consider whether they should be placed in Unit A.