

2008, that the Department would strictly adhere to Special Order 00-023 by removing take-home vehicles from specialized unit detectives but not district sergeant detectives and higher-ranking district detectives. There is no evidence that the Department did not act in accordance with that agreement. Therefore, I find that the Department’s removal of take-home vehicles from specialized unit detectives did not violate the Law.

CONCLUSION

For the foregoing reasons, I do not find that the City violated Section 10(5) and, derivatively, Section 10(a)(1) of the Law as alleged.

APPEAL RIGHTS

The parties are advised of their right, pursuant to MGL Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.

* * * * *

In the Matter of TOWN OF TYNGSBOROUGH

and

LOCAL 888, SEIU

Case No. CAS-11-3762

- 15. *Supervisory and Managerial Employees*
- 17.1 *confidential employee*
- 34.93 *severance*
- 35.2 *confidential employees*
- 35.7 *supervisory and managerial employees*

November 23, 2011

Marjorie F. Wittner, Chair

Elizabeth Neumeier, Board Member

Harris Freeman, Board Member

Darren R. Klein, Esq. *Representing the Town of Tyngsborough*

David Rome, Esq.¹ *Representing Local 888, SEIU*

DECISION

Summary

On January 27, 2011, the Town of Tyngsborough (Town) filed a unit clarification petition with the Department of Labor Relations (Department)² seeking to sever the Town Accountant and the Town Treasurer from a bargaining unit of employees represented by Local 888, SEIU, Mid-Management Chapter (Union). The Town asserts that the incumbents in both positions develop and recommend financial and budgetary policy and therefore are managerial and/or confidential employees within the meaning of Section 1 of MGL c. 150E (the Law). The Town further claims that the Town Accountant’s and Town Treasurer’s continued membership in the bargaining unit impedes it from using their financial expertise to the full extent necessary to cost out collective bargaining proposals and to analyze related confidential collective bargaining information.

On March 29, 2011, the Department held an informal conference to discuss the petition. Both parties submitted position statements and other documents before and after the conference.³ Because it did not appear that there were any material facts in dispute, on August 18, 2011, the Department of Labor Relations issued a letter asking the parties to show cause why the Commonwealth Employment Relations Board (Board) should not resolve the unit placement issue based on the information contained in the letter. Both parties responded to the show cause letter. For the reasons set forth below, the Commonwealth Employment Relations Board (Board) dismisses the petition.

1. Attorney David Rome substituted his appearance for that of Attorney Harold Jones during the course of the investigation.

2. Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations’ name is now the Department of Labor Relations.

3. The Town Administrator, incumbent Town Treasurer and Town Accountant attended the conference, along with Town and Union counsel.

Statement of Facts

After reviewing carefully the parties' responses to the show cause letter, the Board has modified or supplemented the facts where appropriate and supported by the record evidence. Because all material facts necessary to the Board decision in this case are not in dispute, it is appropriate for the Board to decide the case based on the following information:

Background

Local 888, SEIU represents three of the Town's bargaining units: a highway unit, a clerical unit and the Mid-Management unit at issue in this proceeding. Before 2004, the Town Accountant and Town Treasurer were not organized for purposes of collective bargaining, having been specifically excluded from a clerical/administrative unit that the Board certified in 1992.⁴ However, in 2004, the Town voluntarily recognized the Union as the exclusive representative of a Mid-Management bargaining unit comprised largely of the titles originally excluded from the clerical/administrative unit. The recognition clause of the parties' most recent collective bargaining agreement, effective from July 1, 2010 to June 30, 2011, (CBA), states:

The Tyngsborough Board of Selectmen, hereinafter referred to as "the Town," agrees to recognize the SEIU, Local 888 as the exclusive, certified representative for all full-time and regular part-time professional staff for the Town, including those titles listed below but excluding all managerial, confidential, casual and all other employees.

The Town recognizes the Union for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment for the unit described below:

Assistant Assessor,⁵ Town Treasurer, Director of Veteran's Services, Director of Planning and Community Development, Sewer Superintendent and Building Commissioner, Highway Superintendent, Director Board of Health, Town Engineer, Town Accountant, Conservation Director, Recreation and Parks Director.

The Town Administrator, Town Clerk, Tax Collector, Police Chief, Deputy Police Chief, Library Director, Fire Chief, Firefighters, Administrative Assistant to the Board of Selectmen and the confidential assistant in the Police Department are the only Town employees not represented for purposes of collective bargaining.

During the FY 2011 negotiations, the Town proposed removing the Town Accountant and Town Treasurer from the mid-manager's unit. The Union rejected the proposal.

The Town Accountant's Duties

The Town's Accounting office consists of the Accountant and the Assistant Town Accountant. The job summary contained in the Town Accountant's October 2009 job description states:

Under general guidance of the Town Administrator, the Town Accountant manages the municipal accounting system, prepares various financial reports, assists with procurement and budget processes and oversees property and liability insurance.

The Town Accountant's job description includes the following responsibilities:

- Manages the day to day activities of the accountant's office.
- Responsible for keeping accounts and financial records in accordance with local, state and federal laws as well as generally accepted accounting principles.
- Ensures the integrity of financial data by instituting proper internal controls. Performs internal auditing of departmental policies and procedures relating to revenues and expenses.
- Performs maintenance and reconciliation of Town financial records in a timely manner.
- Coordinates and collaborates with a contracting auditing firm to ensure that the annual audit is completed in a timely manner.
- Prepares a comprehensive Annual Financial Report for the Town.
- Submits comprehensive monthly reports to individual departments within the Town.
- Administers the weekly payables system.
- Prepares the department budget. Assists with the development and implementation of the Town-wide budget. Performs capital planning activities, including membership on the Town's Capital Asset Management Committee.
- Understands and follows the duties and responsibilities outlined under Massachusetts procurement laws, including Chapter 30B. Provides assistance in the development, review and award of bids and contracts in all departments.
- Sets departmental goals in coordination with the Board of Selectmen and Town Administrator.
- Supervises departmental staff.

Jacqueline Cronin (Cronin) was the Town Accountant when the Town filed the petition. She held that position since 2007.

As the job description indicates, Cronin has a number of budget-related responsibilities. Although she does not bear ultimate responsibility for formulating the Town-wide budget, she has prepared budget projections for the Town Administrator to present to Town meeting.⁶ Since 2010, she has also made budget presentations to the Board of Selectmen.⁷ Moreover, for a period of about

4. References to the Board include the former Labor Relations Commission. The Board takes administrative notice of a certification issued after consent election in Case No. MCR-4176 for a unit consisting of:

All full time and regular part-time administrative, clerical, technical, service and maintenance, laborers and custodial [Town] employees including Accounting Clerk, ... Assistant to the Treasurer... Treasurer's Clerk [and 27 other titles], but excluding: Assistant Fire Chief, Chief of Police, Council on Aging Director, Director of Veteran's Services, Executive Administrator, Firefighter, Highway Superintendent, Library Director, Secretary to the Board of Selectmen and the Executive Administrator, Tax Collector,

Town Accountant, Town Treasurer, and further excluding all managerial, confidential and casual employees and all other employees of the Town.

5. The Assistant Assessor was originally part of the unit for consent election in Case No. MCR-4176. The certification reflects that the Assistant Assessor was designated as the sole professional employee in the unit and given a separate ballot to vote on whether to be represented in the overall unit, in a separate professional unit, or in no unit at all. The Assistant Assessor voted for "no unit," thereby remaining unrepresented until the Town voluntarily recognized this title as part of the Mid-Management unit.

6. [See next page.]

four months in 2010, the Town had an interim Town administrator who asked Cronin to take control of the Town-wide budget projections. After the interim administrator left, just before the May 2010 Town Meeting, Cronin continued to maintain the Town's budget spreadsheets and entered changes as requested by the new Town Administrator, Michael Gilleberto (Gilleberto).⁸ After the Town filed the instant petition, Cronin voluntarily returned the spreadsheets to Gilleberto.

Cronin also performs a number of tax-related duties, including preparing the Town's annual tax recap reports, free cash estimates and 1099 tax forms. Cronin has also signed off on all Town payables and payroll warrants, provided other tax information to the Department of Revenue, and filed local tax receipts. With respect to collective bargaining, Cronin provides the raw data necessary for the Town Administrator to cost out collective bargaining agreements, but does not do any costing out herself. She does not serve on the Town's Finance or Strategic Finance Committee.

Cronin serves on the Town's Capital Asset Management Committee, but not the Finance or Strategic Finance Committee. She does not regularly attend Board of Selectmen or Tri-Board meetings, but has, on occasion, appeared before both Boards to make budget presentations or answer questions.⁹

Town Treasurer

Kerry Colburn-Dion (Colburn-Dion) has served as the Town Treasurer since 2009. According to the position summary contained in the Town Treasurer's September 2009 job description:

The Town Treasurer plans and administers all operations of the Office of Town Treasurer including cash management, investments, debt service, payroll, health insurance, employee benefits, maintenance of tax title accounts and collection, management of trust funds, and serves as the custodian of all town funds. The Town Treasurer is supervised by the Town Administrator.

The Town Treasurer's job description further lists the following duties and responsibilities:

- Performs all duties and responsibilities of a Town Treasurer as outlined under MGL c. 40, 41, 59 and 60.
- Plans, manages, supervises the operation of the Treasurer's office; develops and oversees departmental budget.
- Develops local, state, and federal annual reports.
- Administers all cash management including cash flow forecasting, investing, and borrowing. Coordinates activities with the Town's financial advisor, bond counsel, rating agencies, and banks.

- Monitors cash levels in the treasury. Prepares cash flow projections of revenues and expenses on a regular basis. Provides a monthly report to the Town Administrator.
- Arranges for the short-term and long-term borrowing of funds as required. Borrows in a prudent, fiscally responsible manner and in accordance with debt service policies and goals, and local, state and federal regulations. Provides a monthly report to the Town Administrator.
- Oversees the administration of the internal payroll system, payroll deductions, payroll withholdings and benefits administration for all employees.
- Supervises, controls and authorizes all checks issued by the Town.

The Town Treasurer is additionally responsible for administering various insurance-related budgets (e.g., health, workers compensation and 111F) and provides recommendations about them to the Town Administrator. She also prepares unemployment cost projections, the Town's unemployment budget and her own department's budget.

The Town Treasurer is responsible for maintaining a high bond rating, and Colburn-Dion has made presentations to the Board of Selectmen regarding the Town's debt. Colburn-Dion has regular dealings with the Town's financial advisor, who is responsible for getting the best rates for the Town. She regularly deals with the Town's bond counsel and provides both the financial advisor and bond counsel with relevant disclosures and financial statements.

Colburn-Dion has not formulated any written Town policies. However, she has asked the Town Administrator to formulate a vehicle and cell phone policy. Colburn-Dion serves on a number of Town board and committees. She is the Town's liaison to the Middlesex Retirement Board and participates in Retirement Board Meetings. She also is the Town's representative to the Board of the Minuteman Nashoba Health Group (MNHG), an insurance purchasing consortium formed under MGL c. 32B. Article 4 of the MNHG Purchase Agreement states:

It is understood and agreed that the [MNHG] Board may rely on the authority of each Board Member to represent the respective Participating Governmental Units, and any vote of any individual Board Member or their alternate representative shall be deemed to be binding upon the Participating Governmental Unit represented by such Board Member.

In this capacity, Colburn-Dion participates in determining future insurance rates. She cannot, however, change, or make recommendations regarding insurance copayments except to the extent those copayments are part of the health coverage plan design that the MNHG is considering.¹⁰

6. The Finance Committee and Board of Selectmen share ultimate responsibility for formulating the budget, which must then be approved by Town meeting.

7. Cronin filed an affidavit in response to the Department's show cause letter, which reflects that, before 2010, Cronin did not prepare or present budget information to the Board of Selectmen and that revenue projections were not presented at Town meeting. The facts have been modified to reflect this information, which is not disputed.

8. The Town's response to the show cause letter clarified that the spreadsheets referenced above had been assigned to the Town Accountant by the Town Adminis-

trator that preceded Gilleberto. The finding has been modified to reflect this information.

9. The Tri-Board is comprised of the Finance Committee, School Committee and Board of Selectmen.

10. The Town's response to the show cause letter clarified that one of the issues the Town Treasurer votes on in her capacity as the Town's representative to the MNHG, is health insurance plan features, including co-payments. The findings have been modified accordingly.

The Town recently formed an Insurance Committee (IC), comprised of members of the Town's Finance and School Committees and two at-large residents.¹¹ Colburn-Dion was asked to sit on this committee, but declined to do so. Nevertheless, she has attended one IC public meeting, and provided the Town Administrator with information about health insurance costs, comparisons and contact information, as well as other public information regarding the Minuteman Nashoba Health Group. The Town Treasurer serves as the Town's representative on the Insurance Advisory Committee (IAC), but the IAC has not met since Colburn-Dion became Treasurer, nor have the Board of Selectmen formally appointed her to serve on this committee.¹²

Collective Bargaining Roles

Both the Town Accountant and Treasurer served on the Union's 2010-2011 negotiations bargaining team for all three of the Union's bargaining units. Moreover, both incumbents signed the Mid-Management Chapter collective bargaining agreement on the Union's behalf.

During the most recent negotiations, neither incumbent was directly responsible for costing out Town proposals or had access to the Town's bargaining proposals before the Union did. However, both Cronin and Colburn-Dion possess and provide the raw data necessary to enable the Town Administrator to calculate the costs of the Town's proposals. During the life of the parties' agreement, Gilleberto also asked Cronin to model the cost of reducing Quinn bill benefits under the terms of the existing agreement, which called for reducing the benefits by the amount not reimbursed by the State.¹³ The previous Town Administrator had never asked Cronin to cost out any union proposals.¹⁴ The parties did not provide any information as to who had costed out collective bargaining agreements prior to 2004.

At some point during the 2010-2011 CBA negotiations, the unions were asked by the Town for ideas to help solve the Town's financial problems. The Union raised the idea of using free cash, which the Town had done in the past. The Town's labor counsel indicated that this could have a negative effect on the Town's bond rating. At the conclusion of this negotiating session, Colburn-Dion called the Town's financial advisor to ask him whether the Town's past practice had hurt the Town's bond rating and if the Town's labor counsel was correct. At the next negotiation session, Colburn-Dion reported back to both parties that the financial advisor told her that

the Town's bond rating would not go down if the Town used some, but not all, free cash and the Town was otherwise showing progress in attending to future financial needs.¹⁵

In or around 2010, the Union filed a grievance over the Town's decision to restore the Sewer Superintendent's hours, which had been cut. This became an issue during negotiations. As a result of the disputed positions' bargaining unit status, the Town Administrator did not ask the Town Accountant to cost out its restoration of hours proposals.¹⁶

Changes to the Position since Certification

The Town asserts that in difficult financial times, as the Town has recently experienced, it consults with the Town Accountant and Town Treasurer more frequently regarding whether revenues are exceeding projections, health insurance costs and other information that only they can model.

Cronin asserted that the only change in her duties since 2004 occurred during her limited custody of the Town's budget spreadsheets. The Union otherwise asserts that the positions have not changed since 2004.

Decision

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 either its inclusion or exclusion from the bargaining unit. *Town of Athol*, 32 MLC 50, 52 (citing *Sheriff of Worcester County*, 30 MLC 132, 136 (2004)). The Board will nevertheless entertain a unit clarification petition seeking to remove a position from an established bargaining unit, even where the duties of the positions have not changed since recognition or certification, under certain rare circumstances, such as when the employee at issue is statutorily excluded from collective bargaining. *Town of Athol*, 32 MLC at 52 (citing *Fall River School Committee*, 27 MLC 37, 40 (2000)). This is because neither the Board nor the courts can compel an employer to continue applying the terms of a collective bargaining agreement if doing so would improperly extend collective bargaining rights to employees not covered by Chapter 150E. *Town of Greenfield*, 32 MLC 133, 149 (2006) (citing *City of Somerville v. Labor Relations Commission*, 53 Mass. App. Ct. 410, 412 (2001)).

11. The committee is apparently different in purpose and structure from the IAC.

12. The findings have been supplemented to include this information, which was contained in Colburn-Dion's affidavit.

13. Based on Cronin's affidavit, this finding has been clarified to reflect that the Town Administrator asked Cronin to calculate the effect of a reduction in state reimbursement of Quinn bill benefits under the terms of the existing collective bargaining agreement.

14. The findings have been supplemented based on Cronin's affidavit to reflect this fact.

15. This finding has been modified and supplemented at the Union's request. The Union contested the finding that the Town Treasurer used the information she received "on the Union's behalf" at the next negotiating session. Colburn-Dion asserts instead that, at the next negotiating session following her conversation with

the financial advisor, she merely informed both Union and Town representatives what the financial advisor had told her. It is undisputed however that the Union first suggested using free cash and that the Town Treasurer was a member of the Union's bargaining team when she called the financial advisor and provided his response to the parties.

16. There were three other matters that needed to be costed out during the last round of negotiations: the cost for restoring Quinn Bill benefits, which the Town Accountant estimated, and the provision of a monthly cell phone stipend for highway employees, which the Town Administrator costed out. Of these matters, the Town Administrator stated that the superintendent's grievance was the only one he would have asked Cronin to model had she not been in the Union. (This finding has been clarified at the Town's request.)

Section 1 of the Law contains the following three-part test to determine managerial status:

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 an appropriate bargaining unit under Section 3 of the Law if the person's actual duties and responsibilities satisfy any one of the three statutory criteria referenced above. *Town of Athol*, 32 MLC at 52 (citing *Town of Manchester-by-the-Sea*, 24 MLC 76, 81 (1998)).

To be considered a managerial employee under the first prong of the managerial test, the employee must make policy decisions and determine mission objectives. *City of Boston, Boston Public Library*, 37 MLC 1, 8 (2010) (citing *Wellesley School Committee*, 1 MLC 1299, 1401 (1975) (*aff'd sub nom. School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112 (1978))). 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). Moreover, the policy-making functions must be made "at levels of the administration where decisions and opinions will not be screened by another layer of administration before being implemented or presented to the [Town]."

The Town argues that both the Town Accountant and the Town Treasurer are managerial employees because they participate to a substantial degree in formulating Town policy by preparing financial analysis of the Town's fiscal affairs for the Town administrator and the Board of Selectmen as well as assist the Town Manager in preparing the annual Town budget. The Town points in particular to the Town Treasurer's role in health insurance administration and serving as the Town's representative on several health insurance benefits related committees.

However, while both employees may prepare financial analyses, there is no evidence that they formulate the Town's fiscal policy. Neither employee sits on the Town's Finance or Strategic Finance committee, nor has the Town pointed to a single fiscal policy that the Town Accountant or Treasurer has formulated. Although both titles may have some responsibility for developing and implementing various budgets, the investigation record does not demonstrate that their role in this regard entails significant policy-making, or that their work is not screened through another layer of administration, here, the Town Administrator. See *Town of Manchester by the Sea*, 24 MLC 76, 82 (citing *Wellesley School Committee*, 1 MLC at 1404) (Library Director who participated in policy making directly with Library's Board of Trustees deemed managerial). The Town cites *Town of Agawam*, 12 MLC 1101 (H.O. 1998), *aff'd*, 13 MLC 1364, 1368 (1986) in support of its claim that preparing financial analyses of the Town's fiscal affairs

and assistance in preparing the Town budget renders them managerial under the policy-making prong of the managerial analysis. The hearing officer in that case held that the Town Accountant was a managerial employee because he reported directly to the Town Council and had independent statutory authority to disallow claims against the Town. The hearing officer also found the Town Collector/Treasurer to be a managerial employee based, in part, upon his role in preparing financial analysis of the Town's fiscal affairs for the Town Manager and each department, and assisting the Town Manager in preparing the Town's entire annual budget. However, the Board affirmed the hearing officer's decision based upon on its review of the entire record. That record included evidence that the Collector/Treasurer played a significant role in collective bargaining and that the Town Accountant costed out bargaining proposals and audited the Town's books. *Town of Agawam*, 13 MLC 1368. See also *Town of Plainville*, 18 MLC at 1011, n. 8 (discussing *Town of Agawam, supra*, and noting that Board's conclusion that the Town Accountant was a managerial employee was based on its review of the entire hearing record and not merely his statutory authority to disallow claims). In this case, by comparison, the Town Accountant and Treasurer have no collective bargaining responsibilities. Although the Town Accountant's job description mentions certain auditing duties, the Town does not rely upon them in arguing that the Town Accountant should be excluded from the unit, and there is no evidence as to what, if any, auditing duties she actually performs. Furthermore, although the budgetary and fiscal reporting duties performed by the accountants in *Town of Easton*, 31 MLC 132 (2005) and *Town of Manchester-by-the-Sea, supra*, were similar to those performed by the incumbents here, the Board in both of those cases based its determination that these employees were managerial on their collective bargaining duties alone. *Town of Easton*, 31 MLC at 144-145; *Town of Manchester-by-the-Sea*, 24 MLC at 81-82. Because the Town Accountant in this case does not perform any collective bargaining on the Town's behalf, the facts of this case more closely resemble those in *Town of Plainville, supra*, where the disputed employee's accounting duties included receiving proposed budgets from various Town departments and preparing an annual report based on information submitted to him by those departments, but no collective bargaining responsibilities. 18 MLC at 1011. In declining to deem this employee managerial, the Board found it significant that he did not serve as Town auditor, discuss other departments' operating budgets with the Selectmen or edit the financial information he received for the annual report. *Id.* Here, other than the fact that the Town Accountant has made budget presentations to the Board of Selectmen, the record is similarly devoid of evidence that Cronin performs such duties. Thus, we conclude that, standing alone, the Town Accountant's budgetary and financial reporting duties do not render her a managerial employee under any prong of the managerial test.

The Town also argues that the Town Treasurer should be excluded from the unit because of her significant role in formulating health insurance policy, including the fact that her vote as the Town's representative to the MNHG is binding on the Town. We do not disagree that this is an important responsibility. Yet, even though the vote may be binding on the MNHG, there is no evidence that the Town Treasurer casts it without first consulting with the Town

Administrator. Further, casting this vote in favor or against a certain insurance plan is not tantamount to determining the Town's bargaining strategy with respect to health insurance. Rather, our Law makes clear that decisions made by health insurance consortiums remain subject to further collective bargaining. *Town of Dennis*, 28 MLC 297, 302 (2002); *see also Town of Easton*, 31 MLC at 145 (fact that Town Treasurer was Town's representative to insurance consortium did not make him a managerial employee since no evidence that employee exercised independent judgment while performing those duties).

Nor do the Town Treasurer's other duties render her a managerial employee. Rather, her responsibilities regarding bond rating, procurement, cash management, communications with outside agencies and advisors, payroll and maintaining the benefits budget are analogous to those of the Treasurer/Collectors in *Town of Easton*, 31 MLC at 143-133 and *City of Amesbury*, 25 MLC 7, 8 (1998), neither of whom played a significant role in collective bargaining. In both those cases, the Board declined to exclude the Treasurer/Collector as a managerial employee on either collective bargaining or policy-making grounds. *Town of Easton*, 31 MLC at 145; *City of Amesbury*, 25 MLC at 9. Although the Town Treasurer in *Town of Manchester by the Sea* also performed similar duties, the Board excluded him based on his substantial involvement in health insurance coalition collective bargaining, and not his other Treasurer duties. 24 MLC at 81-82. Here, even though the Town Treasurer serves in a highly responsible position, based on the cases cited above, she fails to meet the statutory criteria for a managerial employee.

Confidential Status

The Town alternatively argues that both employees are confidential employees because they have access to confidential bargaining information and have specialized financial and employee benefits knowledge warranting their exclusion as confidential.

We disagree. A confidential employee must have a continuing 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). Only 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 Board has construed this exception narrowly to preclude as few employees as possible from collective bargaining rights while not unduly hampering the employer's ability to manage its operations. *Town of Plainville*, 18 MLC at 1009 (citing *Silver Lake Regional School District*, 1 MLC 1240, 1243 (1975)).

Here, there is no evidence that either the Town Accountant or the Town Treasurer have access to the Town's bargaining proposals in advance of the union. As noted above, while the Town Treasurer may know what the MNHG has proposed ahead of other Town employees or Union officials, this is not the same as having access to the Town's bargaining proposals before the Union does. *Town of Easton*, 31 MLC at 146.

In addition, citing *Millis School Committee*, 22 MLC 1081 (1985), the Town argues that both titles' specialized knowledge regarding the impact of wages and benefits proposals renders them both confidential. In *Millis*, the Board excluded the Computer Systems Manager (CSM) as a confidential employee because, among other things, his "specialized knowledge of how to input contemplated wage and benefit proposals" enabled him to "easily predict what the School Committee would offer at negotiations." *Id.* at 1086-1087. In *Millis*, however, the CSM attended weekly meetings with the Superintendent in which the Superintendent told the CSM of the School Committee's latest bargaining proposals and then asked the CSM to model the proposals' effects on bargaining unit members. *Id.* Here, even though the Town Accountant and Town Treasurer have specialized knowledge of the Town's budgets and financial affairs, there is no evidence that they are privy to what proposals the Town is considering ahead of time or that the financial information the Town Accountant and Town Treasurer possess otherwise alerts them to the Town's bargaining positions. *Fall River Housing Authority*, 37 MLC 173, 179 (H.O. 2011), *aff'd* CAS-06-3651 (slip. op. September 26, 2011) (distinguishing *Millis* on grounds that Senior Property Managers did not have advance notice of or formulate Housing Authority's bargaining proposals).

Moreover, while there is little doubt that both incumbents are capable of costing out the Town's proposals, since 2004, the Town Administrator has done this on his own. While the Town Accountant costed out the cost of reducing Quinn benefits under the terms of the existing contract, which called for reducing benefits by the amount not reimbursed by the state, this calculation did not expose the Town Accountant to the Town's proposals before the Union saw them.

Ultimately, the Town claims that it was prevented from fully using the Town Accountant's and Town Treasurer's skills and knowledge during the last round of negotiations because they sat on the SEIU's three bargaining teams. The Town claims that it is critical that it be able to utilize information prepared by the positions' incumbents, as well as their advice, without the conflict of union membership. We are not unsympathetic to this argument. However, in 2004, the Town voluntarily recognized a Mid-Managers unit that included the disputed titles. The record contains no information regarding their duties before 2004. Since at least 2004, however, the Town has structured its operations and collective bargaining such that these employees do not perform duties that render them confidential or managerial within the meaning of the Law. As such, this case is converse of those in which a union seeks to represent employees who are already performing confidential or managerial duties. In those situations, the Board generally declines to require an employer to reallocate job, duties, undo its structural hierarchy, or change the composition of its bargaining team merely because it is possible to do so. *See, e.g., Town of Manchester-by-the-Sea*, 24 MLC at 82 (citing *Town of Framingham*, 17 MLC 1233, 1237-1238 (1990)). Here, in the absence of evidence that the disputed employees are already performing managerial or confidential duties, we will not remove them from the Mid-Managers unit, even if, as the Town argues, their present un-

ion membership prevents it from optimally using their fiscal expertise.

Conclusion

For the foregoing reasons, the Board declines to grant the Town's petition to remove the Town Treasurer and the Town Accountant from the Union's bargaining unit and the petition is dismissed.

SO ORDERED.

* * * * *

In the Matter of AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 93,
LOCAL 1700

and

JUSTIN B. CHASE

Case No. MUPL-07-4581

72.2 duty to investigate and process grievance

November 30, 2011

Kendrah Davis, Hearing Officer

Joseph L. DeLorey, Esq. Representing AFSCME,
Council 93

Michael F. Drywa, Jr., Esq. Representing Justin B. Chase

HEARING OFFICER'S AMENDED DECISION¹

Summary

The issue is whether the American Federation of State, County and Municipal Employees, Council 93, Local 1700 (Union) breached its duty of fair representation to Justin B. Chase (Chase) by failing to file a grievance on behalf of Chase in response to his November 30, 2006 request for assistance and fail-

ing to investigate his layoff² and displacement rights under Section 4.6 of the collective bargaining agreement in violation of Section 10(b)(1) of Massachusetts General Laws Chapter 150E (the Law). Based on the record, and for the reasons explained below, I conclude that the Union breached its duty of fair representation when it failed to file a grievance on behalf of Chase in response to his November 30, 2006 request for assistance and failed to investigate his layoff and displacement rights under Section 4.6 of the collective bargaining agreement in violation of Section 10(b)(1) of the Law.

Statement of the Case

On April 2, 2007, Chase filed a Charge of Prohibited Practice (Charge) with the Department of Labor Relations (DLR)³ alleging that the Union violated Sections 10(b)(1) and 10(b)(3) of the Law. On July 15, 2009, the Commonwealth Employment Relations Board (Board) issued a Complaint of Prohibited Practice and Order of Dismissal (Complaint), alleging that the Union interfered with, restrained and coerced Chase in the exercise of his rights under Section 2 of the Law in violation of Section 10(b)(1).⁴ On July 24, 2009, the Union filed its Answer and on September 30, 2009, the DLR issued a Notice of Hearing. I conducted a hearing on May 6 and 10, 2010.⁵ The parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. On the first day of hearing, the Union elected to bifurcate the hearing and present evidence regarding the merits of the grievance at a subsequent proceeding, if necessary.⁶ On July 12 and August 9, 2010, Chase and the Union filed their post-hearing briefs, respectively. On the entire record, I make the following findings of fact and render the following decision.

Admissions of Fact

The Union admitted to the following facts:⁷

1. The Union is an employee organization within the meaning of Section 1 of the Law.
2. The Union is the exclusive bargaining representative for certain employees employed by the Town of Rockland (Town) at the Highway Department (Department).

1. The Hearing Officer amends the original decision, which was issued on November 30, 2011, to indicate that the parties engaged the services of a stenographer and that the written transcript was received by the Department as the official record of the hearing.

2. Although the Complaint alleges that the Union violated the Law by failing to investigate Chase's displacement rights, the parties fully litigated the issue of whether the Union similarly violated the Law by its handling of Chase's layoff grievance, and this issue relates to the general subject matter of the Complaint. See *City of Worcester*, 5 MLC 1397, 1398 (1978).

3. Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations is now the DLR. Pursuant to Chapter 145 of the Acts of 2007, the DLR was given "all of the legal powers, authorities, responsibilities, duties, rights and obligations previously conferred on the labor relations commission."

4. In its Complaint, the Board dismissed Chase's Section 10(b)(3) allegation due to lack of standing.

5. Pursuant to 456 CMR 13.11(4), the parties engaged the services of a stenographer and requested that the written transcript become the official record of

the above-captioned hearing. This request was granted provided that: (1) a copy of the written transcript was made available to the Charging Party with the opportunity to specify to the Board any objections to the accuracy of the transcript; (2) a copy of the written transcript was made available for purchase by the Charging Party for a reasonable fee that is reflective of the cost of the transcript; and, (3) a copy of the written transcript was provided without charge to the Board with the understanding that the Department of Labor Relations will make the transcript available to the public pursuant to the provisions of state law. On August 9, 2010, the parties complied with these provisions and the transcript was received as the official record of the hearing.

6. See *Quincy City Employees Union, H.L.P.E.*, 15 MLC 1340, 1355 (1989), *aff'd sub nom., Pattison v. Labor Relations Commission*, 30 Mass. App. Ct. 9 (1991), *further rev. den'd*, 409 Mass. 1104 (1991); see also *United Rubber, Cork, Linoleum and Plastic Workers Of America, Local 250, AFL-CIO*, 290 NLRB 817, 820-21 (1988).

7. In its Answer, the Union made full and partial admissions of fact. This section of my decision reflects the Union's full admissions of fact, only.