

In the Matter of BOARD OF TRUSTEES (UMass Dartmouth)  
and  
AMERICAN FEDERATION OF TEACHERS LOCAL 1895,  
EDUCATIONAL SERVICES UNIT

Case Nos. CAS-08-3719 and CAS-11-1074

**34.91**     *accretion*  
**34.93**     *severance*  
**35.7**      *supervisory and managerial employees*  
**93.4**      *petition for clarification*

*April 2, 2013*

*Marjorie F. Wittner, Chair*  
*Elizabeth Neumeier, Board Member*  
*Harris Freeman, Board Member*

*James Cox, Esq.*                     *Representing University of  
Massachusetts, Dartmouth*

*Haidee Morris, Esq.*               *Representing American  
Federation of Teachers, Local  
1895, Educational Services Unit*

**AMENDED DECISION<sup>1</sup>**

Summary

This case concerns two unit clarification petitions. The first, Case No. CAS-08-3719, was filed by the University of Massachusetts at Dartmouth (University) on January 25, 2008. That petition seeks to exclude five titles from a bargaining unit of professional and administrative employees represented by the American Federation of Teachers, Local 1895, Educational Services Unit (Union or ESU).<sup>2</sup> The second, Case No. CAS-11-1074, was filed by the ESU on July 26, 2011. The ESU seeks to accrete five positions to its unit on grounds that they are new positions that share a community of interest with its bargaining unit.<sup>3</sup> The University contends that none of the titles at issue in either petition should be included in ESU's unit because these titles perform duties that render them managerial or confidential employees within the meaning of MGL c. 150E (the Law). The University also contends that many of these titles should be excluded because they supervise other bargaining unit members. The Union disputes these assertions and contends that the titles at issue in both proceedings either should remain in its unit or are appropriately accreted thereto.

Both parties filed extensive position statements, affidavits, job descriptions and other pertinent documents for each petition. The Department of Labor Relations (DLR) consolidated the cases and held an informal conference on October 17, 2011. Both parties submitted additional materials after the conference.

On December 17, 2012, the DLR sent a letter requesting that the parties show cause why it should not resolve the unit placement issues raised by both petitions based on information contained in the letter. Both parties responded to the letter and provided additional affidavits. The Board has reviewed all the evidence and determined that there are no material facts in dispute that preclude it from resolving the unit placement issues before it. Based on this evidence, which we summarize below, the Board grants the University's petition in Case No. CAS-08-3719 only with respect to the Director of Public Safety. The other four titles shall remain in the ESU's unit. The Board grants the ESU's petition to accrete the Senior Philanthropic Officer, Director of Leased Campus Facilities, and Assistant Dean of Academic Programs, Charlton College of Business. It dismisses the petition as to the Budget Director and the Coordinator of Business Programs.

Statement of Facts<sup>4</sup>

*Background Relevant to Both Petitions*

The University is part of the state university system. It employs approximately 1,100 employees. The ESU represents the administrative employees at UMass Dartmouth only. There are four other bargaining units at the University comprised of: 1) faculty, 2) police officers, 3) trades workers, and 4) maintenance/clerical employees. The University is led by a Chancellor, to whom two Vice Chancellors directly report: the Vice Chancellor for Academic Affairs, also known as the Provost, and the Vice Chancellor for Administration and Finance, also known as the Chief Operating Officer. There are also a number of Assistant and Associate Vice Chancellors, including an Assistant Vice Chancellor for Human Resources, an Associate Vice Chancellor for Student Affairs and an Assistant Vice Chancellor of Advancement.<sup>5</sup>

*Original Certification*

On September 16, 1975 in Case No. SCR-2037, the former Labor Relations Commission certified the ESU<sup>6</sup> as the exclusive representative of a bargaining unit comprised of approximately 35 different administrative titles employed by the University. The titles listed in the original certification included the Director of Admissions, the Assistant Director of Admissions, the Director of Financial Aid, the Director of University Records, the Director of Stu-

1. This decision was amended to correct a number of small typographical errors that do not affect its substance.

2. The University's original petition sought to exclude thirteen titles. After the informal conference, the University withdrew its petition as to the following eight positions: Director of Admissions, Director of Alumni Affairs, Director of Financial Aid, Director of IT Infrastructure, Executive Director for IT Service Assurance, University Registrar, Dean of Students, and Director of IT Development.

3. The Union's original petition sought to accrete nine titles. At the informal conference, the Union withdrew its petition without prejudice with respect to the following four titles Assistant Dean for Library Public Services; Licensing Associate; Ex-

ecutive Director of Online Operations/PCE; and Director of Facilities and Physical Plant.

4. These findings are based on the uncontested facts contained in the Show Cause letter as modified by the parties' post-Show Cause submissions.

5. This finding has been modified to reflect information contained in the parties' post-show cause submissions.

6. In 1975, the University was known as the Southeastern Massachusetts University. The ESU was known as the Southeastern Massachusetts Federation Local 1985.

dent Health and Counseling, the Director of Audio-Visual Services, a number of Staff Assistants, including the Staff Assistant-Admissions, the Controller, the Bursar/Assistant Controller and the Assistant Bursar. The certification specifically excluded a number of titles, including the Associate Dean of Students, the Assistant to the Dean of Students, the Director of Planning and Plant, and the Business Manager.

In 1996, the parties entered into a Memorandum of Agreement that added the following titles to the unit: Special Assistant to the Chancellor for Economic Development, Director of Grants and Contracts, Director of Educational Technology and Support Services, Director of Informational Technology Systems and Services, and Alumni Director.

#### *Current Bargaining Unit*

The Union and the University are parties to a collective bargaining agreement that is effective by its terms from July 1, 2009 - June 30, 2012 (CBA). Article I of CBA, “Recognition,” states that the ESU is the exclusive bargaining agent of a bargaining unit consisting of the titles listed therein. Over 200 titles are listed, including the five titles that the University seeks to exclude in Case No. CAS-08-3719.<sup>7</sup> The list itself contains no exclusions. However, a different section of Article I, the “Definitions” provision, excludes “Administrators,” which are defined as “The UMass Dartmouth Chancellor and other principal administrative officers of the University.” This provision further states that “Individuals who hold the title of ‘Associate Chancellor,’ ‘Associate Vice Chancellor,’ ‘Associate Vice Chancellor,’ and ‘Vice Chancellor’ shall be considered to be non-unit employees and excluded from membership in the bargaining unit.” According to a list that the ESU provided, as of 2011, there were approximately 84 administrative, non-academic titles employed by the University that were not represented for purposes of collective bargaining, including employees with the title of Chancellor, Assistant Chancellor, Assistant Vice Chancellor, Associate Vice Chancellor, Provost, and Dean (Law School, CCB, COE, SEPPCE).

The parties are in general agreement that academic deans and assistant academic deans are not included in the bargaining unit. Academic department chairpersons report to academic deans. The recognition clause lists a number of deans, specifically, the Assistant Dean/Director of the Frederick Douglas Unity House, the Assistant Dean of Student Affairs and Outreach, the Associate Dean of Continuing Education, and one of the titles that the University seeks to remove, the Associate Dean of Students. The Assistant Dean/Director of Frederick Douglas Unity House, the Associate Dean of Students and the Assistant Dean of Students all work in the Student Affairs Division.<sup>8</sup>

#### *Salary Classifications*

As set forth in the CBA, ESU salary classifications range from Level 10 - Level 19, which are denoted on ESU job descriptions as “ESU, Cat. 18,” “ESU, Cat. 19,” etc. The 2009-2012 CBA sets forth the minimum and mid-point annual salaries and points for each level. In the CBA’s third year, the minimum salary for a Level 10 employee was \$32,331. The mid-level of a Level 19 employee was \$84,466.

#### *Evaluations*

Article V(E) of the 2009-2012 CBA describes the annual evaluation process for bargaining unit members. That procedure requires supervisors to evaluate each bargaining unit member on or near the member’s anniversary date of hire or change of job.<sup>9</sup> Subparagraph 4 of this section states, in part, that, “Should merit money be available, the evaluation will be taken into consideration in determining the award of merit increases.” Subparagraph 5 states, “Department heads who report directly to non-unit supervisors will be evaluated by them using the same process.” Subparagraph 6 states in part that, “The evaluation will be forwarded to the division head or designee by the supervisor upon completion of the evaluation for signature.” Bargaining unit members have the right to appeal their overall rating to their Division Head, who renders a final decision.

#### *Changes of Appointment - External Appointments and Internal Appointments*

Article V of the 2009-2012 CBA, “Appointment and Reappointment,” describes the procedure for appointments, reappointments, changes of appointment, and for filling new and vacant positions. As set forth below, Article V, Section B.1, “Changes of Appointment, External Appointment,” contains exceptions to this procedure for the Director of Admissions, Director of Athletics, Director of Financial Aid, Director of Housing and Residential Life, Director of Public Safety and Director of University Records. Section B.1 states:

Individual external appointments after October 1, 1998 to the following bargaining unit positions, Director of Admissions, Director of Athletics, Director of Financial Aid, Director of Housing and Residential Life, Director of Public Safety and Director of University Records, may be removed from these positions based on an annual evaluation at less than meritorious performance as deemed by the Chancellor. If the individual has completed at least three (3) years of service in the position, removal shall constitute placement of the member to an associate or assistant director’s position within the bargaining unit with a salary rate of no lower than the mid-point of the category for which the associate or assistant is in. Decisions in these cases shall not be subject to Arbitration or to the provisions of Article XI [Grievance Procedures].

7. The parties’ submissions included a copy of the parties’ 2009-2012 CBA. In its response to the Show Cause letter, the University states that the parties negotiated a successor to this agreement, effective from July 1, 2012 to June 30, 2015, which contains no changes to Article I.

8. This section has been modified to reflect the Union’s response to the Show Cause letter and to add undisputed relevant facts from the parties’ previous submissions.

9. The University’s response to the Show Cause reflect that the 2012-2015 contract now requires supervisors to evaluate all bargaining unit members at the same time each year.

Article B.2, “Changes of Appointment - Internal Appointment,” also permits the University to remove the incumbents in these titles from their individual internal appointments based on “annual evaluations at less than meritorious performance as deemed by the Chancellor.” This provision allows the removed members to return to their formerly held seniority and bargaining unit position or a similar one and removes these decisions from the grievance/arbitration procedure.

Articles V.C.2 and C.2.A, “New and Vacant Positions,” requires the University to fill all new and vacant positions within the bargaining unit by promotion, with the exception of the six Directors positions referenced above.

#### *Appointing Authority*

In September 2010, the University published a document titled “Procedures and Policies for Recruitment, Selection and Hiring.” According to this publication, the Appointing Authority is the Chancellor or the Chancellor’s designee.

#### *Grievance Procedure*

In January 2013, the Chancellor’s Office designated its Human Resources Department, rather than Vice Chancellors (Division Heads) or their designees, to hear ESU grievances at Step I. As a result of this change in designation, no ESU titles at issue in this proceeding hear ESU grievances at any level.<sup>10</sup>

#### *Policy Procedure*

The document titled “Policy for Creating and Establishing Policy and Procedures” (Policy Procedure) sets forth the relationship between University-wide and campus-wide policies and who approves them. It states in part:

The authority to determine which policies require Board of Trustees approval rests with the Office of the President. All other University policies are by definition campus policies and are approved by the Chancellor or his/her designee. Any College, Department, or Operational Memoranda cannot supersede or conflict with a campus policy.

Section IV (B) of this policy, “Development, Approval or Rescission,” reflects that all proposed policies must first be screened through the Vice Chancellor “having primary responsibility for the policy area.” If he or she recommends the policy, he or she must then submit it for “official consideration and approval” to the Vice Chancellor for Administration and Finance (VCAF), who then circulates it to all or several of the campus units for additional

input, comments and advice. Once reviewed, the proponent Vice Chancellor can then recommend to the VCAF that the revised proposal be forwarded to the University Chancellor for consideration and approval. If it is not approved, the Chancellor will return the proposal to the VCAF, who will discuss with the proponent Vice Chancellor what changes should be made. At that point, the proposal may be resubmitted to the Chancellor for final consideration, approval and signature. Pursuant to Section IV (B) (3) of this policy, campus policies and procedures remain in effect until amended or rescinded by the Chancellor.<sup>11</sup>

#### *CAS-08-3719 - The Disputed Titles*

The record contains the following information about the job duties and terms and conditions of employment of the five titles that the University seeks to exclude from the bargaining unit.<sup>12</sup>

##### 1. Associate Dean of Students - ESU, Cat. 19

The Associate Dean of Students reports to the Assistant Vice Chancellor of Student Affairs.<sup>13</sup> This title was originally excluded from the certified unit, but the parties agreed to include it in 1976, where it has remained since. This title requires a Master’s degree in counseling, student development or a related field.

#### *Duties*

The main duties of the job are to plan, implement and administer programs and services that promote the quality of campus life for students. In particular, the incumbent in this title manages the offices of New Student and Family Orientation, Disabled Student Services, and Greek Affairs. The Associate Dean of Students also coordinates the student leave and withdrawal process, and develops, implements and oversees programs for commuter students, returning students and veterans. She also serves as Freshman Class Advisor and advisor to the Freshman Honors Society and acts as an unofficial ombudsperson for student conflict within the institution. The Associate Dean also serves at the “Dean on Call” to respond to after-hours student emergencies.

The incumbent participates in writing Student Affairs policy. For example, she has worked with the department head of the Center for Access and Success to update its policies to ensure legal compliance. She also works with the Coordinator of Student Conduct to revise student conduct policies and procedures. The Associate Dean drafts these policies for the Board of Trustees’ ultimate ap-

10. This fact has been modified to reflect uncontested information contained in the Union’s response to the Show Cause letter, including a memo from Carol D. Santos, Assistant Vice Chancellor of Human Resources, setting forth the changes to the grievance hearing designees set forth above.

11. The Union’s response to the Show Cause letter referenced certain provisions of the University’s Policy Procedure, which it originally submitted in November 2011. The Board has incorporated those provisions and summarized others for the sake of completeness.

12. This information is based on job descriptions and the parties’ submissions. Specifically, in support of Case No. CAS-08-3719, the University provided affidavits from Emil Fioravanti, the Director of Public Safety; David Milstone, the Associate

Vice Chancellor for Student Affairs; and Kimberly Pennock, the Information Systems Manager in Human Resources. In response to the Show Cause letter, the University provided affidavits from Santos, and Jeff Augustine (Augustine) Director of Campus Services. The Union provided an affidavit from ESU Chairperson, Bruce Sparfven (Sparfven).

13. The Student Affairs Department is led by the Associate Vice Chancellor to whom the Assistant Vice Chancellor reports. The Associate Dean of Students reports directly to the Assistant Vice Chancellor. This department was reorganized in 2009 when the University decided to temporarily remove the Vice Chancellor for Student Affairs position. At that time, the Vice Chancellor’s work was distributed among the Associate Vice Chancellor, the Assistant Vice Chancellor and the Associate Dean of Students.

proval. The incumbent serves as the University’s hearing officer for Step One AFSCME grievances.<sup>14</sup>

*Supervisory Responsibilities*

The Associate Dean directly supervises four ESU titles, including the Coordinator of Student Conduct and the Director of the Center for Access and Success. The University asserts that she has hiring, firing and disciplinary authority regarding these employees. According to Vice Chancellor Milstone’s affidavit, the Associate Dean exercised that authority recently by deciding whether to terminate an AFSCME member.<sup>15</sup>

2. Director of Athletics - ESU, Cat. 19

As of 2011, the position is located within the University’s Administration and Finance Division, reporting directly to the VCAF.<sup>16</sup> The “Director of Physical Education” title has been in the unit since 1975. The “Director of Athletics” title has been in the unit since at least 1990.<sup>17</sup> The Director of Athletics is one of the titles exempted from Article V’s change of appointment and vacancy procedures. The position requires a Master’s degree or an equivalent combination of education, training and experience necessary to successfully perform the essential functions of the position.

*Duties and Responsibilities*

According to the job description, the Director of Athletics implements policy, procedure and direction for the Department of Athletics in conjunction with the Vice Chancellor for Student Affairs. The Director of Athletics is also responsible for managing all aspects of the University’s Department of Athletics in accordance with the NCAA Division III policies and frameworks, such as insuring that the Athletics Department complies with Title IX’s mandate for athletic gender equality.

The Director of Athletics has drafted other Athletic Department policies including the Athletic Participation policy, which requires student-athletes to meet standards higher than those set by the NCAA in order to compete in their second semester of playing sports. He has also drafted a Pre-Season Reporting Date Policy, a Playing Date Policy, a Transportation Policy setting forth the transportation each team will use for away games, a Facility Scheduling Policy, an Hours of Operation Policy, a Meal Money Policy and a Professional Development Policy, which was established to support coaches and staff for continuing education. In collaboration with Academic Affairs division, the Director also establishes policy for recruitment and retention of student athletes.

The overall Athletics budget is set by Administrative and Fiscal Services. The Athletics Director is responsible for establishing a line item budget for each sport and area each year and to manage budget cuts.

The incumbent represents the Department on campus-wide committees and represents the University at regional and national conferences and meets. He meets with the Vice Chancellor every other week.

The Director of Athletics is the Step 1 grievance hearing officer for the AFSCME and Mass Maintainer bargaining units.

*Supervisory Responsibilities*

The Director of Athletics supervises approximately eighteen employees represented by ESU, AFSCME and AFT/Mass Maintainers. The University contends that this supervisory authority includes the ability to hire, discipline and terminate employees. The University provided four examples of how the incumbent, Ian S. Day (Day), has exercised this authority.

1) On April 15, 2010, Day sent a letter to an ESU bargaining unit member informing her that she would not be appointed to a third year of service pursuant to Article V-Section A-5 of the CBA.<sup>18</sup>

2) On September 22, 2009, Day provided a Notice of Intent to Terminate Employment to a member of the AFT Maintenance and Custodial unit. due to attendance and vacation procedure infractions. The notice included information about the bargaining unit member’s right to a termination hearing and stated that if the employee did not attend the hearing, the “University” would make a decision based on the information already in its possession.

3) On August 21, 2008, Day suspended the employee referenced in # 2, above, for five days.

4) On October 23, 2007, Day notified an ESU bargaining unit member that she would not be reappointed to a third year of service, pursuant to Article V, Section A-4 of the CBA.

3. Director of Campus Services - ESU, Cat 18

Previously located within the Department of Student Affairs, this position is now organized within the Administration and Finance Division and, like the Director of Athletics, reports to the Vice Chancellor of Administration & Finance, the University’s Chief Operating Officer. The position requires a Master’s degree.

The title “Director of Campus Services” does not appear in any of the recognition clauses of the three CBAs the parties provided

14. This finding has been modified to reflect that this title no longer serves as the Step 1 Hearing Officer for ESU grievances. See section titled “Grievances,” above.

15. The Union disputes this allegation in its response to the Show Cause. In his affidavit, Sparfven states that a) that the Associate Dean of Students had no final termination authority; and b) that no AFSCME bargaining unit members were terminated at the time in question, as Milstone stated in Paragraph 4 of his November 2011 affidavit. We do not resolve this dispute because, even if true, the discipline was not imposed on an ESU bargaining unit member and therefore, as discussed in greater detail in the Opinion section below, does not create the type of intra-unit conflict that might ordinarily cause the Board to create a separate supervisory unit. See, e.g., *City of Westfield*, 7 MLC 1245, 1250 (1980).

16. When the petition was first filled, the Director of Athletics was organized within the Student Affairs Division and reported to the Vice Chancellor for Student Affairs.

17. Neither party provided the exact date when the title changed to “Director of Athletics” or when the title “Director of Athletics” was first included in the unit.

18. Article V of the CBA states in pertinent part:

1. Initial appointments may be for a term of one, two or three years, but shall be for a minimum period of one year.

...

5. [T]he last day to notify of non-reappointment to a third year of service is 90 days prior to the end of the second year of service.

(1990 - 1993, 2004-2007, and 2009-2012). However, a similar title, “Director of Campus Center” is included in the recognition clauses of these agreements. Neither party presented information regarding when or how this title became part of the ESU.

#### *Duties*

The Director of Campus Services is responsible for the Campus Service Department’s operational budget, capital outlay, renovations projects, and revenue generation. The Director administers contracts and obligations for food services and other vendors providing services to the University and determines how the resources and services will be utilized to develop revenue.<sup>19</sup> The incumbent also determines how much revenue will be allocated to reserves and capital outlay, which, according to the University, affects how services will be provided to the campus community. The incumbent also exercises significant decision-making authority in the Division of Administration and Finance pertaining to auxiliary services, such as the mail room, print shop, parking and transportation.

The incumbent is the budgetary authority for the Campus Services Department. He develops and manages a \$10.7 million budget. He makes recommendations regarding budget matters to the Vice Chancellor, with whom he meets twice a month on financial matters.<sup>20</sup> His budgetary responsibilities include projecting the income based on fees collected from the prior year, allocating funds for the upcoming year and sending a projected budget up for approval. He makes recommendations for increases in dining rates and Campus Center fees, which are then approved or denied by the Board of Trustees. The Director of Campus Services has no approval responsibility and no control over the fees collected. The Board of Trustees has, in the past, not approved Augustine’s recommendation for a fee increase.<sup>21</sup>

#### *Supervisory Responsibilities*

This title supervises 23 employees in the Campus Services Division and provides direct supervision to at least two ESU titles, the Associate Director of Campus Services and the Assistant Director of Campus Services/Operations and Administrative Staff. The Director has the authority to recommend for hire individuals who were recommended to him by the interview committee. However, he has no authority to terminate anyone and must receive approval before disciplining anyone.<sup>22</sup> The Director of Campus Services serves as the Step 1 hearing officer under the AFSCME contract for disputes arising in Campus Services.

Augustine has served on two committees. He served on a ten-person committee that recommended a policy on school dances to the

VCAF. He also sits on a parking policy committee that makes recommendations for the VCAF’s consideration and action. The parking committee includes union representatives.

#### 4. Director of Housing and Residence Life - ESU, Cat. 19

This title is located within the Student Affairs Division and reports to the Associate Vice Chancellor for Student Affairs. The position requires a Master’s degree in Business, Student Personnel or a related field. This title was not included in the original certification, but the parties’ 1976 agreement included the titles “Director of Housing” and “Director of Residence Life.” The combined title of “Director of Housing and Residence Life” has been in the unit since at least 1990. It is one of the six positions exempted from the procedures set forth in Article V of the 2009-2012 CBA. A similar position is excluded from the University of Massachusetts/Amherst bargaining unit.

#### *Duties*

Approximately 4500 students reside in campus housing. According to the job description, this position has the primary responsibility for residence hall programming, plant management, technology management, budget development, fiscal management and staffing. The incumbent is responsible for developing and maintaining a residence life environment in the residence halls and student apartments, for coordinating off-campus housing services, for overseeing the coordination of the work of the residence hall maintenance, custodians and residence life staff, and for planning and assessing all aspects of the Department. The incumbent also jointly oversees all renovation and construction projects in the residence facilities. As of 2011, the Director developed and maintained a \$27 million housing budget.

The Director is responsible for all policies regarding housing and residence life. She drafts housing contracts, designed the upper-class student room selection process and drafted all the residential policies that appear in the Student Handbook. Although the Associate Vice Chancellor ultimately approves the policies that the Director drafts, the Director is responsible for most of the drafting and policy creation.

The Director serves as the Step 1 hearing officer for AFSCME grievances.

#### *Supervisory Responsibilities*

The job description states that this title supervises “Associate Directors and other professional staff, clerical staff and student assistants.”<sup>23</sup> The University’s most recent submission indicates that this title supervises twenty-one employees, eleven of whom are

19. The affidavit that Augustine provided to the University stated that he supervises and administers the University’s food service \$10-11 million annual contract with Chartwell and its \$150,000 annual contract with Pepsi.

20. This fact has been modified to reflect the University’s response to the Show Cause letter, which states that the meetings are held twice a month, not twice a week, as, stated in the Show Cause letter.

21. This section has been supplemented to reflect information contained in the Augustine affidavit that the Union submitted. The Union’s affidavit different from, but does not contradict, the information contained in the Augustine affidavit that the University submitted.

22. These findings have been supplemented to reflect information in the Augustine affidavit submitted by the Union.

23. As the Union points out in its response to the Show Cause letter, the job description does not state that this supervisory authority includes hiring and firing authority.

ESU members. The ESU members include an Associate Director, three Assistant Directors and eleven building directors.

5. Director of Public Safety, ESU, Category 19

As of January 2011, this title was administratively assigned to the Administration and Fiscal Division and reported directly to the Vice Chancellor, Chief Operating Officer of the University.<sup>24</sup> The title “Chief of Safety and Security” was included in the ESU’s original certification and appeared in the parties’ recognition clause through at least 1990.<sup>25</sup> The parties’ 2004-2007 and 2009-2012 CBAs include the title “Director of Public Safety.” It is one of the six positions exempted from the change of appointment and vacancy filling requirements set forth in Article V of the 2009-2012 CBA. The Director of Public Safety position requires a Bachelor’s degree, with a Master’s degree preferred. This position is excluded as a managerial employee on the UMass Lowell, Boston, Amherst and Medical School campuses.

*Duties*

The incumbent in this title oversees the University’s Department of Public Safety, including police functions, security parking and shuttle services, community relations, and fire protection systems. The Department has a budget of \$2.5 million.

The Director of Public Safety develops and maintains policies and procedures for departmental operations and directs department planning. The incumbent determines the mode of campus policing, the security devices to be purchased, the training to be offered employees, and the firearms that campus police can carry.<sup>26</sup> In preparation for the Department’s application for accreditation by the Massachusetts Committee of Police Accreditation, the Director of Public Safety revised every policy within the department. He has the authority to approve and implement all policies. The Director also chairs the University’s Emergency Response Committee.

The International Brotherhood of Police Officers (IBPO) represents twenty-four sworn uniformed police officers and supervisors and six unsworn officers employed by the University. The Director of Public Safety has sat on the University’s bargaining team and developed proposals for the last three successor contracts that the University negotiated with the IBPO. He also participates in impact bargaining with the IBPO and is the Step 1 grievance Hearing Officer for the IBPO contract.

24. The position formerly was located within the Student Affairs Division, reporting to the Vice Chancellor for Student Affairs.

25. The University asserts that the “Chief, Safety and Security” and the “Director of Public Safety” are two different titles, but does not identify the differences between the titles or indicate when the “Director of Public Safety” title was first included in ESU’s unit.

26. Campus police officers carry firearms and have the power of arrest on Commonwealth property.

27. The record for Case No. CAS-11-1074 is comprised of the parties’ written submissions and responses to the show cause letter, which included the disputed titles’ job descriptions and job descriptions for what the Union claims are comparable

*Supervisory Responsibilities*

The Department of Public Safety employs approximately 40 people. The Director of Public Safety supervises six of them, including one ESU title, the Environmental Health and Safety Officer. The incumbent states that he has disciplinary authority over employees in the Department but that any decision he makes regarding discipline or termination are approved by Human Resources. He also serves as the hiring authority for the Department based upon recommendations of the search and screen committee.

CAS-11-1074

The record contains the following information about the job duties and terms and conditions of employment of the five titles that the Union seeks to accrete to its bargaining unit.<sup>27</sup>

1. Coordinator of Business Processes

This position, first posted in March 2010, is located within the Administration Division/Budget Department. The incumbent in the position, who has held the position for over two years, reports to the Associate Vice Chancellor for Financial Services. The title requires a Bachelor’s degree.

*Duties*

The Coordinator’s main role is to vet all new or revised University-wide policies before they are implemented pursuant to the University’s “Policy for Creating and Establishing Policy and Procedures.” This requires her to review all proposed policies in light of existing policies and to confer from time to time with the Chancellor’s office and sometimes the Legal Department. She is authorized to draft changes and to send them back to the issuing department for their review.

The Coordinator of Business Processes coordinates all four financial areas of the University: the Controller, Purchasing, Budget Office and the Law School. She assists and advises each of these offices with long-term strategy as set by the Associate Vice Chancellor for Financial Services.

The Coordinator also works on projects assigned by the Chief Operating Officer/Vice Chancellor of Administration and Financial Services, including matters regarding salary information, budget details and University policy decisions.

The Coordinator also works closely with the Budget Office on new budget processes and sits on the Budget Review Board.<sup>28</sup>

ESU positions. The University provided affidavits from Marilyn Presto (Presto), Budget Director, Cheryl Emmet (Emmet), Coordinator of Business Processes, Neal Gouck (Gouck), Assistant Dean of Undergraduate Programs (Charlton College of Business) and David Wilbur (Wilbur), Senior Philanthropic Officer. It also provided an affidavit from Salvatore G. Filardi (Filardi), the Associate Vice Chancellor for Administrative Services, to whom the Director of Leased Campus Facilities reports. In response to the Show Cause letter, the University provided several more affidavits, including second affidavits from Presto and Gouck.

28. Sparfven’s second affidavit states that he (Sparfven) also sits on the Budget Board of Review.

The Coordinator attends meetings with executive-level administrators at which collective bargaining proposals and budgets, including budget cuts, are discussed. The Coordinator does not, however, respond to grievances, attend grievance hearings or act as the University's designee at Step 2 grievances. Nevertheless, if a grievance arises concerning whether the University has followed a particular contract or policy, the Coordinator reviews the applicable document and offers her opinion and corrective action to the VCAF as to whether there has been a violation.

*Supervisory Responsibilities*

The job descriptions states that this title "supervises administrative support staff" but provides no further details.

2. Director of Leased Campus Facilities

This title, which was first posted on February 16, 2011, is located in the Administration and Finance Division in the Facilities Department. The incumbent is supervised by the Associate Vice Chancellor for Administrative Services.<sup>29</sup> Other ESU titles in the Facilities Department include the Assistant Director for Facilities (ESU, Cat. 18), Facility Manager (School for Marine Science and Technology (SMAST))(ESU, Cat. 14), and the Construction Projects Manager (ESU, Cat. 17), the Associate Director of Facilities Planning, Design and Construction (ESU, Cat 16). All of these titles requires a Bachelor's degree, and are responsible for managing the maintenance, custodial, planning, remodeling or security functions of various campus facilities.

*Duties*

This Director of Leased Campus Facilities title was created in 2011 when the University leased a 107,000 square foot building in New Bedford for the College of Visual and Performing Arts. The incumbent is responsible for the management of the physical building, and hires and oversees contractors. He works with the Dean of the College and the Coordinator of the College to identify tasks within the building that need to be completed. Although the position's job description indicates that this title "will have access to and provide input regarding policy formulation for collective bargaining," the record contains no evidence that the Director of Leased Campus Facilities has any collective bargaining responsibilities whatsoever.

*Supervisory Responsibilities*

The job description states that this title may supervise students and other Facilities staff as assigned but provides no further details.

3. Assistant Dean for Undergraduate Programs - Department of Academic Affairs - Charlton College of Business (CCB)

This position was first posted on July 1, 2010. It is located within the CCB's Academic Affairs. The incumbent reports to the CCB's Dean.

*Duties*

The incumbent in this position oversees the administration of the University's College of Business, which has 1,500 undergraduate students. He primarily interacts with students and addresses their needs in various capacities, including special needs requests and planning special student events, such as career fairs and orientation. He is the admissions point of contact for the CCB and produces all of the marketing and information items that are sent to prospective families. He counsels students on the academic judicial process and the academic aspects of the CCB's study abroad program. He manages and reviews the CCB's enrollment and marketing data. He also teaches a freshman introductory business course every semester. The incumbent is also in the process of developing a cooperative education program for CCB students with other University officials in the administration and in other colleges of the University. In this capacity, he is exploring offering credit for the experience and the impact of the experience upon other University programs and student benefits.<sup>30</sup> Minimum qualifications for this title include a Master's degree in a discipline relevant to the CCB. Preferred qualifications include "higher education administrative experience" and "knowledge of CCB curriculum and experiential activities, e.g., internship programs."

There are several other ESU titles that advise students on academic issues including the Undergraduate Academic Advisor (ESU, Cat. 12), the Coordinator of Undergraduate Business Programs (CCB) (ESU, Cat. 12), and the Associate Director of Academic Advising (ESU, Cat. 14).<sup>31</sup>

A comparison of the CCB's Assistant Dean's and Coordinator of Undergraduate Business Program's job descriptions shows significant overlap in primary responsibilities such as student recruiting, student advising, internship coordination, attending Chair and Dean's meetings and serving either as an ex officio member or a resource person to the Undergraduate Curriculum Committee. The Associate Director of Academic Advising's job description indicates that one of the incumbent's primary responsibilities is to teach Student Success workshops and/or one course per academic year as part of First Year Experience. Like the Assistant Dean at issue here, the Associate Director is required to hold a Master's Degree.<sup>32</sup>

29. Although the job description states that the Director of Leased Services reports directly to the VCAF, the University provided an affidavit from Filardi, the Associate Vice Chancellor for Administrative Services in which he states that he supervises the Director. We have modified our original finding accordingly.

30. This finding has been supplemented to reflect information contained in the second affidavit provided by the incumbent in this title.

31. In its response to the Show Cause letter, the Union states that the Undergraduate Academic Advisor and Coordinator of Undergraduate Business Program positions have been vacant since the University filled the Assistant Dean title.

32. This finding has been supplemented to include more information about the titles the ESU claim share a community of interest with the Assistant Dean. The Union submitted the job descriptions for these titles both in its November 2011 and post show-cause submissions.

*Supervisory Responsibilities*

The job description states that this title supervises professional and/or clerical staff as assigned. The parties' submissions contain nothing further regarding this title's supervisory duties.

## 4. Budget Director

This position is located within Administrative and Fiscal Services in the Financial Services Department. The incumbent reports to the Associate Vice Chancellor for Financial Services, an excluded title. She is on the same organizational level as the Assistant Vice Chancellor, Coordinator of Business Processes, and the Controller.<sup>33</sup> This position was posted in March 2010 and filled in September 2010. In August 2012, Presto, who was the first Budget Director, began serving as the Interim Associate Vice Chancellor of Financial Services. The University has since filled the Budget Director position on an interim basis.<sup>34</sup>

The position requires a Master's degree in business administration, management finance, and accounting, or a related field or equivalent combination of education and experience.

*Duties*

The Budget Director is responsible for managing the University's operating budget, including determining the budget methodology used. She prepares budget models and calculates anticipated budgets on a rolling five-year basis. The Budget Analyst projects and develops, and manages, analyzes and monitors all budget functions for the Facilities and Physical Plant Department.

The Budget Director participates in the UMass President's management meetings for the budget directors for all UMass campuses, where she discusses collective bargaining and ramifications of future negotiations. She also participates with executive-level managers in developing strategy for dealing with economic downturns and reduced funding, including calculating savings resulting from potential reductions in workforce.

This title's job description states that, "The Budget Director will have access to and provide input regarding data collection and analysis for all collective bargaining proposals prior to their submission to the unions." Before the Budget Director assumed the Interim Vice Chancellor post, she costed out wage proposals for the University's five bargaining units and examined the financial impact of labor negotiations upon the University's budget. She also has access to the payroll data for all University employees and develops projections regarding the impact of budget deficits or funding reductions upon University employees.<sup>35</sup>

The Union asserts that this title shares a community of interest with the Assistant Budget Director (ESU, Cat. 13), Assistant Controller (ESU Cat. 15), Internal and External Budget Analysts (ESU, Cat. 12) and the Senior Budget Analyst (ESU, Cat. 14). Like the Budget Director, the Internal Budget Analyst communicates with Vice Chancellors, Deans and Directors regarding issues related to personnel expenses, assists in the coordination and management of the internal budget process and performs budget modeling for alternative budget strategies. The job descriptions for these titles do not reflect any supervisory duties or participation in the UMass President's management meetings on budget matters.

*Supervisory Responsibilities*

The Budget Director supervises and prepares the evaluations for four ESU titles: the Budget Analyst, the Budget Assistant, the Senior Budget Analyst and the Senior Budget Coordinator.

## 5. Senior Philanthropic Officer

This position, as described below, was created in November 2010.<sup>36</sup> It is located within the Division of Institutional Advancement and reports to the Assistant Vice-Chancellor of Advancement. The position requires a Bachelor's degree.

*Duties*

The University created this title to identify, cultivate and solicit major gifts (\$10,000 and up) to the Engineering College. Working independently, the incumbent in this title manages all aspects of the gift process. The Engineering College has a Dean's Advisory council and an individual department advisory board. The incumbent drafted by-laws for the Dean's Advisory Council. The incumbent also has some input into the Engineering College's strategic plan. The Senior Philanthropic Officer meets with the Assistant Vice Chancellor for Advancement bi-weekly to report on his progress and works with him to develop his goals. He also works directly with the Chancellor on cultivating donors and other senior administrative staff. He has access to specific financial information for fund-raising purposes.

The Union asserts that this title shares a community of interest with the Director of Donor Relations (ESU, Cat. 15), the Prospect Researcher (ESU, Cat. 11), the Director of the Annual Fund (ESU, Cat 15), and the Major Gifts Officer - College of Visual and Performing Arts (ESU, Cat. 13), all of whom report to Vice Chancellor, Assistant Vice Chancellors or Deans and have responsibility for fundraising and cultivating University gifts in various departments. The Union further asserts that this position is nothing more than a retitling of the Major Gifts Officer position,<sup>37</sup> which was in-

33. Although the original certification included the Controller, this title is not included in the 2009-2012 CBA's recognition clause.

34. This finding has been modified in response to additional information the University provided in response to the Show Cause letter.

35. This information has been added to reflect facts contained in Presto's second affidavit.

36. The title "Senior Philanthropic Officer" has existed at the University for over twenty years. Until 2010, it was held by a single individual, Don Ramsbottom

(Ramsbottom), who retired sometime in 2011. The record does not indicate what Ramsbottom did or whether the University filled his position after he retired. The University states that it hired a second Senior Philanthropic Officer in or around October 2009 to support "another division of the University," specifically to identify and develop major gifts for the Engineering College. However, the affidavit provided by the current incumbent in the position states that his position was "newly created" when he was appointed to it, approximately one and half years before he signed the affidavit in October 2011.

37. According to its job description, the Major Gifts Officer is "responsible for securing contributed private gifts in their many forms; major gifts, annual gifts, corporate and foundation gifts, private grants and others. ..." The Director of the An-



cluded in ESU's unit but was vacant at the time the Union filed its petition.

*Supervisory Responsibilities*

The job description states that this title supervises assigned classified and professional staff but does not identify those staff. The incumbent's affidavit does not reflect any supervisory duties.

Opinion<sup>38</sup>

CAS-08-3719

The Board must decide whether to grant the University's petition to remove five titles from ESU's existing bargaining unit on grounds that they are managerial, confidential, and/or supervise other ESU titles.

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)). Further, a unit clarification petition is appropriate if the outcome sought by the petition is "... clearly supported by an apparent deficiency in the scope of an existing unit and must be, at least arguably, within the realm of what the ... parties intended when the unit was first formulated." *Id.* A unit clarification petition, however, cannot be used to frustrate the parties' clearly expressed unit placement of a disputed classification. *Id.* at 52 (citing *City of Somerville*, 1 MLC 1234, 1236 (1975)). Also, a unit clarification petition is generally not the appropriate procedural vehicle to change the composition of an existing bargaining unit by severing positions to create a new bargaining unit. *City of Quincy*, 10 MLC 1027, 1031 (1983). Severance petitions inherently involve questions of representation that are not properly resolved in a unit clarification petition. *Town of Athol*, 32 MLC at 52.

On the other hand, the Board is statutorily obligated pursuant to Section 3 of the Law to fashion units that are consistent with stable and continuing labor relations. Thus, under certain rare circumstances, the Board has entertained a CAS petition on its merits, even where the duties of the positions(s) at issue have not changed since recognition or certification, to determine whether the unit remained appropriate in light of certain significant operational changes, *see, e.g., City of Quincy*, 10 MLC at 1031, and where the disputed positions are held to be either managerial or confidential employees within the meaning of Section 1 of the Law such that their continued inclusion in the unit would render the unit inappropriate as a matter of Law *See, e.g., Town of Athol*, 32 MLC at 53 (excluding library director as managerial even though her duties had not changed since the unit's certification). The Board will, however, modify a bargaining unit structure under these circum-

stances only where it determines that the existing unit is inappropriate as a matter of law and not merely not "the most appropriate unit." *City of Quincy*, 10 MLC at 1033. *Compare Town of Athol, supra*, to *Town of Millbury*, 33 MLC 47 (2006) (employer's petition to sever assistant treasurer collector denied where position deemed non-managerial and Town's community of interest argument failed to persuade Board that unit was inappropriate as a matter of law).

In this case, the University seeks to sever five bargaining unit members from ESU's unit on grounds that they are managerial employees who also supervise other bargaining unit members. To determine whether or not to exclude these titles, we therefore must determine whether the title is managerial or whether its continued inclusion in the unit renders the unit inappropriate as a matter of Law.

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, 9 (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). To meet the standards established in the first part of the test, it must also be shown that the employee "functions at levels of administration where decisions and opinions will not be screened by another layer of administration before being implemented." *Holyoke School Committee*, 4 MLC 1607, 1610 (1977).

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.

nual Fund is responsible for managing all aspects of the Annual Fund. This title's job description states, in part, that the Director "reports directly to the Assistant Vice Chancellor and collaborates with Advancement, Foundation, Alumni, Chancellor's offices and other campus leaders to develop and to implement the annual

fund strategies and programs that include the identification, cultivation solicitation and stewardship of annual gifts from trustees, alumni, parents and friends."

38. The Board's jurisdiction is not contested.

Identifying problem areas to be discussed during bargaining or merely consulting about bargaining proposals is insufficient to satisfy this second criterion. 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 (citations omitted).

Construing the third statutory test of a managerial employee, the Commission has determined that the words “independent judgment” require that an employee exercise discretion without consultation or approval. *Town of Manchester-by-the-Sea*, 24 MLC at 81 (citing *Wellesley School Committee*, 1 MLC at 1408). A coincidence of recommending and acceptance by a higher authority is insufficient. *Id.* To be “substantial,” the responsibility must not be perfunctory or routine; it must have some impact and significance. *Id.* Finally, the appellate authority must be exercised beyond the first step in a grievance-arbitration procedure. *Id.* The exercise of supervisory authority to insure compliance with the provisions of a collective bargaining agreement is insufficient, standing alone, to satisfy this third criterion. *Id.* (citing *Town of Agawam*, 13 MLC at 1369)).

#### Confidential Status

Section 1 of MGL c. 150E defines a confidential employee as one who directly assists and acts in confidential capacity to a person or persons otherwise excluded from coverage under this chapter. The Board has construed this statutory language to cover 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). 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 employers’ 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. *Id.* (citing *Silver Lake School Committee*, 1 MLC 1240, 1243 (1975)).

#### Supervisory Status

Historically, the Board has established separate bargaining units for supervisors and the employees they supervise. *Boston School Committee*, 11 MLC 1352, 1360 (1985); *Town of Greenfield*, 5 MLC 1036, 1040 (1978). The rationale is that individuals who possess significant supervisory authority owe their allegiance to their employer, especially concerning issues involving employee discipline and productivity. *Town of Bolton*, 25 MLC 62, 67 (1998) (citations omitted). Thus, by creating separate bargaining units, the Commission avoids placing supervisors in the position of having to discipline employees on whom the supervisors rely in the exercise of their collective bargaining rights. *Id.* (citing *City of Westfield*, 7 MLC 1245, 1250 (1980)). However, the Board has strong reservations about adopting an approach to bargaining unit determinations that creates more than one supervisory bargaining

unit in a particular workforce. *Sheriff of Worcester County*, 30 MLC 132, 138 (2004 (citing *Lowell School Committee*, 8 MLC 1010, 1014 (1981) (Board declines to sever principals and headmasters from a bargaining unit of administrators)).

With these principles in mind, we turn to analyze the five positions that the University seeks to sever from the ESU.

#### 1. Associate Dean of Students

The University argues that the Associate Dean is responsible for developing a broad range of policies that the ESU-represented directors and coordinators beneath her implement and monitor, including all student conduct policies. The Union claims on the other hand that this title has been in the bargaining unit since 1976 without change and therefore should not be severed from the unit. In response, the University claims that the University has grown in size and complexity since 1976. Further, as the Student Affairs Division has grown with the influx of residential students, the number of bargaining unit members this employee supervises, evaluates and disciplines has also increased.

We decline to remove the Associate Dean from the unit. Although the Associate Dean has undoubtedly participated in drafting, updating and revising a number of campus policies, the record shows that she has done so in conjunction with her Department Head, the Assistance Vice Chancellor for Student Affairs, and/or with other employees, like the Coordinator of Student Conduct. Furthermore, the University’s policy-making procedure demonstrates that all campus policies are necessarily screened through the Vice Chancellor “having primary responsibility for the policy area,” in this case, the Assistant Vice Chancellor for Student Affairs, to whom the Associate Dean reports. The Associate Dean, therefore, does not operate at a level of the administration where her decisions and opinions are not screened by another layer of administration before being implemented and, accordingly, does not meet the criteria for a managerial employee under the managerial test’s first prong. *Holyoke School Committee*, 4 MLC at 1610. Because there is no evidence that the Associate Dean meets any of the criteria under the test’s second and third prongs, there is no basis to conclude that she is a managerial employee within the meaning of Section 1 of the Law.

As to the Associate Dean’s supervisory functions, the only evidence the University provided concerning the Associate Dean’s duties was that she recently decided whether to terminate an AFSCME employee. Even assuming this is true, supervisory authority in and of itself does not make an employee managerial. *Commonwealth of Massachusetts*, 6 MLC 2110, 2113 (1980) (citing *Worcester School Committee*, 3 MLC 1653, 1672 (1977)). Moreover, because this authority was exercised over a non-bargaining unit member, her continued presence in the unit would not create the sort of intra-union conflicts that form the rationale for creating separate supervisory units. *See City of Westfield, supra.* More generally, the ESU is a unit comprised of administrators and supervisors. Since 1975, the unit has included bargaining unit members that exercise some supervisory authority over other bargaining unit members at several levels of the organizational struc-

ture.<sup>39</sup> This is made evident in Article V of the CBA, which, in describing the process for evaluating bargaining unit members, states that the “same process should be used in instances where Department Heads report to non-unit members.” This provision is reasonably read to mean that the evaluation process is ordinarily used in instances where bargaining unit members report to other bargaining unit members, thereby demonstrating that the parties have recognized and bargained over the fact that the bargaining unit consists of multiple layers of supervisory personnel. Although this does not create an ideal situation, the Board is generally reluctant to adopt an approach to bargaining unit determinations that may effectively create more than one supervisory bargaining unit in a particular workforce. *City of Boston* 37 MLC at 13 (citing *Sheriff of Worcester County*, 30 MLC at 138)). Under these circumstances, the fact that the Associate Dean of Students or, for that matter, any of the other four titles discussed below, may exercise some supervisory authority over other bargaining unit members does not, standing alone, warrant their severance from the unit.

#### 2. Director of Athletics

The University contends this title should be excluded as a managerial employee based on the incumbent’s policy-making authority. The University further argues that the Athletics Director has significant supervisory authority, including hiring, evaluation, discipline and termination. The Union argues that the University has provided insufficient evidence of change to this title since 1975 to warrant its exclusion from the unit. The Union also asserts that the NCAA sets many of the policies that the University attributes to the Director of Athletics. In response, the University disputes that the Director of Athletics title was in the original certified unit and contends that Director drafts policies that exceed the NCAA’s requirements.

We decline to remove this title from the unit. The University relies exclusively on the Director of Athletics’ policy-making authority (Prong 1) to support its attempt to exclude him as a managerial employee. Although the evidence reflects that this title is involved in establishing and implementing policy within the Athletics Department, it falls short of establishing that his decisions are not screened through another layer of administration, the Vice Chancellor, before they are approved and implemented, or that many of the policies he drafts, such as Hours of Operation and Transportation and Facility Scheduling, are of major importance to the overall mission and objectives of the public employer. Moreover, while the Director of Athletics has some supervisory authority, as we have noted above, this is true of many other titles in ESU’s unit, which consists of multiple layers of supervisory personnel. Moreover, the University has not provided evidence that this position’s duties have changed since it was included in the unit in 1990, if not earlier.

Finally, as demonstrated by Article V of the 2009-2012 CBA, “Appointments and Reappointments,” the parties have bargained about this title and agreed that it, along with several other Director titles, should be treated differently in terms of appointment and re-appointment. Because we have determined that the Athletic Director’s continued presence in the unit does not render the unit inappropriate as a matter of Law, the University is precluded from using the CAS petition to frustrate the parties’ clearly expressed unit placement of this title. *Town of Athol*, 32 MLC at 52.

#### 3. Director of Campus Services

The University contends that the Director of Campus Services is a managerial position whose decisions regarding resource and service allocation significantly impact the University’s ability to serve the community. According to the University, only the Vice Chancellor of Institutional Advancement is responsible for generating greater revenue for the University. The Union argues that this title has been in the unit since 1975 and the University has failed to demonstrate changes sufficient to warrant its exclusion now. The University disputes that the title has been in the unit since 1975 and claims that its responsibilities for various campus services warrant its exclusion.<sup>40</sup>

The Director of Campus Services is responsible for administering some of the University’s major contracts with vendors and for administering his budget and revenues generated from the services he oversees. Although these duties are clearly important, they do not establish that, under the managerial test’s first prong, the Director of Campus Services play a major role in formulating or determining campus policies that are central to the University’s mission. Indeed, the incumbent himself provided an affidavit contesting that he has any policy-making authority. There is no evidence that the duties performed by the incumbent in this title meet the other two prongs of the managerial test or that his supervisory responsibilities are different from other ESU members or have created internal unit conflicts. We therefore decline to sever this title from the unit.

#### 4. Director of Housing and Residence Life

The University contends that this position formulates all policies concerning residence hall programs, management of the halls and budget and staffing for the office and halls. The University further contends these policies impact on residential University student life in terms of safety, visitation and lifestyle choices. The Union contends that this title has been in the unit without significant change since 1976. The University replies that the University’s larger residence population has necessitated changes in the duties and complexity of the position.

Although the Director of Residence Life has policy-making and supervisory functions, we decline to remove this position from the ESU’s unit for the same reasons we declined to sever the Director

39. For example, the original certification included the titles Director of Admissions, Assistant Director of Admissions and Staff-Assistant, Admissions.

40. The University claims that this title was created on April 18, 2004 and was not in the original certification. The University did not, however, provide information as to how or when this Director of Campus Services title became part of the unit such that it now seeks its exclusion.

of Athletics - that is, her decisions are screened by another layer of administration, the Associate Vice Chancellor for Student Affairs, and her supervisory duties, standing alone, do not warrant her removal from the unit.

5. Director of Public Safety

The University compares its Department of Public Safety to a small municipal police department and asserts that the Director of Public Safety routinely engages in the formulation of policy that impacts every campus visitor. The University therefore contends that the Director of Public Safety is a managerial employee within the meaning of the Law based on these duties as well as his extensive involvement in IBPO labor-management matters. The Union claims that the University has presented insufficient evidence of changed duties since 1975 to justify its exclusion from the ESU unit. The University replies that the position was not in the original certification and that the position remains active in bargaining with the IBPO.

The undisputed evidence shows that the Director of Public Safety sits on the University's bargaining team and has developed proposals for the last three successor contracts that the University negotiated with the IBPO. This evidence is sufficient to meet the second prong of the managerial test, which requires that the employee to participate in actual negotiations or otherwise be involved in the collective bargaining process by preparing bargaining proposals. *Town of Manchester-by-the Sea*, 24 MLC at 81. We exclude this title on that basis.<sup>41</sup>

Case No. CAS-10-1074

This petition requires us to analyze whether the five titles the ESU seeks are appropriately accreted into ESU's existing unit. In analyzing whether employees should be accreted into an existing bargaining unit, the Board uses a three-step test. First, the Board determines whether the position was included in the original certification or recognition of the bargaining unit. Second, if that examination is inconclusive, the Board will examine the parties' subsequent conduct, including bargaining history, to determine whether the employee classifications were considered by the parties to be included in the unit. Finally, if that inquiry is also inconclusive, the Board will examine whether the positions sought to be included in the unit share a community of interest with the existing positions. If the Board determines that the requisite community of interest exists, it will accrete the petitioned-for employee into the existing bargaining unit. *Town of Granby*, 28 MLC 139, 141 (2001) (citing *Town of Dartmouth*, 22 MLC 1618, 1621 (1996)); *Worcester School Committee*, 15 MLC 1178, 1180 (1988).

41. Because we have determined that the Director of Public Safety meets the criteria for a managerial employee under the second prong of the managerial test, we do not consider whether his policy-making functions suffice to exclude him under the first prong as well.

42. The University's first written submission asserted that this title was either managerial or confidential. At the informal conference, the University stated that it was seeking to exclude the position as confidential only.

1. Coordinator of Business Processes

The Union contends that this title is appropriately accreted into the bargaining unit because there is no evidence that the incumbent performs any financial analysis, develops or manages any financial proposals, or participates to a significant degree in any collective bargaining proposals. The Union contends that this title performs duties similar to a number of other existing ESU titles, including the Assistant Budget Director (ESU, Cat. 13), Assistant Controller (ESU, Cat. 15), Staff Assistant/Budget Analyst (ESU, Cat. 12), and Senior Budget Analyst (ESU, Cat. 14).

The University contends that the Coordinator is a confidential position based on her access to budget information and meetings at which collective bargaining proposals are discussed.<sup>42</sup> Other than objecting to the inclusion of this title on confidentiality grounds, the University does not contend that this title lacks a community of interest with other ESU employees.

As a threshold matter, we consider the University's contention that this title is a confidential employee. The evidence shows that the Coordinator reports to the Associate Vice Chancellor for Financial Services, a title excluded as "administrative" from the ESU's unit under Article I of the CBA.<sup>43</sup> She attends executive level-meetings at which collective bargaining proposals are discussed and offers her opinion directly to the VCAF on the merits of, and correction action for, grievances concerning the University's adherence to contracts and policies. Both of these responsibilities, particularly the last one, demonstrate that the VCAF has an expectation of confidentiality in her dealings with the Coordinator and that the Coordinator has access or exposure to the University's bargaining proposals and grievance responses before other employees. For these reasons, we find that she is a confidential employee and decline to accrete her to the ESU's unit.

2. Director of Leased Campus Facilities

The incumbent in this title is responsible for the management of a building in New Bedford that the University leases for use by the College of Visual and Performing Arts. The Union argues that this title is a non-managerial/non-confidential title that shares a community of interest with other similar ESU titles like the Facilities Operations Manager (ESU, Cat. 15), the Assistant Director of Facilities, (ESU, Cat. 18) and the Space Planning Manager (ESU, Cat. 13). Although the job description for this title indicates that the title will have access to and provide input regarding policy formulating for collective bargaining there is nothing else in the record, which includes an affidavit from the incumbent's supervisor, the Associate Vice Chancellor for Administrative Services, that indicates that the incumbent actually performs any duties that render him a confidential or managerial employee and the University does not specifically argue that this is the case.

43. The Union does not dispute that the Assistant Vice Chancellor for Finance is an excluded employee within the meaning of Section 1 of the Law. At a minimum, we find that the VCAF, also known as the University's Chief Executive Officer, and the individual through whom all policy decisions are vetted for approval and amendment before being forwarded to the University's Chancellor, is a managerial employee within the meaning of Section 1 of the Law.

We therefore turn to the three-part accretion analysis. The first two prongs of the accretion analysis are inclusive because the title was created in the spring of 2011 and there is no evidence that the parties bargained over the position. We must therefore determine whether the Director of Leased Facilities shares a community of interest with other ESU titles.

To determine whether employees share a community of interest, the Board considers factors such as similarity of skills and functions, similarity of pay and working conditions, common supervision, work contact, and similarity of training and experience. *Princeton Light Department*, 28 MLC 46, 48 (2001); *Town of Bolton*, 25 MLC at 65 (citing *Boston School Committee*, 12 MLC 1175, 1196 (1985)). No single factor is outcome determinative. *City of Springfield*, 24 MLC 50, 54 (1998)(citing *City of Worcester*, 5 MLC 1108, 1111 (1978)). The Law requires that employees share only a community of interest rather than an identity of interest. *City of Springfield*, 24 MLC at 54.

We find that the Director of Leased Facilities shares a community of interest with many of the other Facilities Department titles in the ESU's unit in terms of similarity of duties, training and experience. Like the Assistant Director for Facilities, Facility Manager (School for Marine Science and Technology (SMAST)), the Construction Projects Manager, and the Associate Director of Facilities Planning, Design and Construction, this title requires a Bachelor's degree and is responsible for oversight and management of maintenance, custodial, planning, remodeling and security functions of various campus facilities. This title is appropriately accreted to the ESU's unit.

3. Assistant Dean of Academic Programs, Department of Academic Affairs Charlton College of Business (CCB)

The ESU contends that this position is neither managerial nor confidential and shares a community of interest with a number of other ESU titles including the Undergraduate Academic Advisor (CCB), the Coordinator of Undergraduate Business Programs, and the Associate Director of Academic Advising (all of whom advise students on academic issues. In its response to the Show Cause letter, the ESU notes that the Undergraduate Academic Advisor and Coordinator positions have been vacant since the University created the Assistant Dean/CCB title and that the Assistant Dean is therefore doing bargaining unit work.

The University contends that the incumbent in this position should be excluded because he exerts a "tremendous amount of authority over academic policy within the College of Business" and is one of three executive-level administrators who manage the CCB. The University contends that he drafts procedures and makes decisions about the interpretation of CCB and University policy as it applies to students. Finally, the University contends that this title shares a community of interest with other assistant deans who are excluded from the unit.

As a threshold matter, we find no basis to conclude that the incumbent in this position meets the criteria for a managerial or confidential employee. He has no collective bargaining or labor relations responsibilities, and, although the incumbent performs important work, the evidence does not establish that he formulates

or determines policies that are of central importance to the University's mission or that are not screened through another level of administration. We therefore turn to whether he shares a community of interest with other ESU titles.

We conclude that he does. The Assistant Dean position performs virtually the same duties and has the same educational requirements as the Undergraduate Academic Advisor and Coordinator ESU titles, both of which have been vacant since the University filled the Assistant Dean position. The fact that the Assistant Dean teaches a business course every semester does not transform this title into an excluded Academic Dean position since at least one other ESU title, the Associate Director of Academic Advising, has similar teaching duties. This title is appropriately accreted into the ESU's unit.

4. Budget Director

The Union argues that this position should be accreted into its unit because it is neither managerial nor confidential and shares a community of interest with other ESU titles. The University contends that this title is either managerial or confidential because the incumbent advises the Chancellor and Vice Chancellor on collective bargaining proposals as well as budgetary policy.

The evidence reflects that the incumbent in this title has costed out wage proposals for the University's five bargaining units and participated in budget meetings discussing collective bargaining and the ramifications of future bargaining at the highest possible level of University management - the Office of the University President. We conclude that her access to this confidential labor relations information and her relationship with the excluded Associate Vice Chancellor for Finance renders her a confidential employee within the meaning of Section 1 of the Law. We therefore decline to accrete her to the ESU's unit and do not reach the parties' other arguments concerning this title.

5. Senior Philanthropic Officer

We first address the University's argument that the Union's petition to accrete this title is contract-barred. Pursuant to 456 CMR 14.06 (2):

Except for good cause shown, no petition seeking clarification or amendment of an existing bargaining unit shall be entertained during the term of an existing valid collective bargaining agreement, unless such petition is filed no more than 180 days and no than 150 days prior to the termination date of said agreement, provided that a petition to alter the composition or scope of an existing unit by adding or deleting job classifications created or whose duties have been substantially changed since the effective date of the collective bargaining agreement may be entertained at other times.

The University claims that the Senior Philanthropic Officer title has existed for over twenty years substantially unchanged and that the Union's petition as to this title, which was filed on July 26, 2011, falls outside of the open period set forth above and is therefore contract-barred.

We disagree. Although the Senior Philanthropic Officer title may have previously existed, the University provided no evidence of the duties that Ramsbottom, the former Senior Philanthropic Offi-

cer, performed before he retired. Moreover, the University's own submissions make clear the title at issue in this proceeding was created in or around November 2010 to focus on fundraising and donor cultivation for the Engineering College. The University provided an affidavit from the incumbent in the new title that describes his position as "newly-created" when he filled it in 2010. Based on these facts, we find that the title at issue in this proceeding was newly-created during the term of the parties' CBA. We therefore do not find that the Union's petition as to this issue is contract barred and turn to whether it should be accreted to the ESU's unit.

The University argues that it should not because its policy-making duties and access to financial information warrants its exclusion from the unit as a managerial or confidential employee. We disagree that this title should be excluded. He has no collective bargaining or labor relations responsibilities. Although the incumbent performs important work, the evidence does not establish that he has participated to a substantial degree in formulating or determining policies that are of central importance to University's mission or that are not screened through another level of administration, here, the Assistant Vice Chancellor for Advancement. Although, like many other University employees, the incumbent may have access to certain financial information that may be considered sensitive, it is well-established that mere access to sensitive, non-labor related financial data does not make an individual a confidential employee. *Town of Wareham*, 36 MLC 76, 79 (2009)(citing *Town of Belchertown School Committee*, 1 MLC 1304, 1308 (1975)).

We therefore turn to whether he shares a community of interest with other ESU titles. As we have found above, this title was newly-created in 2010. In the absence of any evidence that the parties bargained over this title and agreed to include or exclude it, the first two prongs of the accretion analysis are inconclusive. As to the third prong, the Union contends that this title shares a community of interest with other ESU titles that perform fund-raising and donor cultivation functions. We agree that these positions, especially the Major Gifts Officer and the Director of the Annual Fund, are substantially similar in reporting authority, duties and requirements to the Senior Philanthropic Officer. Based on this community of interest, we accrete this title to the ESU.

#### Conclusion

For the above-stated reasons, we grant the University's petition in Case No. CAS-08-3719 as to the Director of Public Safety. We dismiss it as the remaining titles, which shall remain in the ESU's unit.

We grant the ESU's petition in Case No. CAS-11-1074 to accrete the Director of Leased Campus Facilities, the Assistant Dean of Academic Programs (CCB) and the Senior Philanthropic Director into its unit. We dismiss the petition with respect to the Budget Director and the Coordinator of Business Processes, which shall remain non ESU titles.

So Ordered.

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## In the Matter of the Arbitration Between: FALL RIVER HOUSING AUTHORITY

and

AFSCME, COUNCIL 93

ARB-091-2007

**113.05**    **seniority**  
**113.119**   **work assignments**

*April 2, 2013*

*Timothy Hatfield, Arbitrator*

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**T**he Department, having afforded the parties full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at the hearing, having considered the issues, and, having studied and weighed the evidence bearing on the issues, awards as follows:

#### INTRODUCTION

A unilateral petition was filed by AFSCME, Council 93. Under the provisions of G.L., Chapter 23C, Section 9P, the Department of Labor Relations<sup>1</sup> appointed Timothy Hatfield, Esq., to act as a single neutral arbitrator with the full power of the Department.<sup>2</sup> The undersigned Arbitrator conducted a hearing at the Department's office in Boston on October 13, 2011.

The Union was represented by Jaime DiPaola-Kenny, Esq. Appearing for the Union were Richard White and Beverly Roberts.

The Employer was represented by Ernest M. Ladeira, Esq. Appearing for the Employer were Thomas Collins and Daniel McDonald.

The parties' briefs were received by January 11, 2012.

#### THE ISSUES

What shall be the disposition of the grievances marked joint exhibits four and five?

What shall be the remedy?

#### RELEVANT CONTRACT LANGUAGE

The parties' April 1, 2006 through March 31, 2009, Collective Bargaining Agreement for Unit A (Clerks) contains the following pertinent provisions:

##### Article II - Management Rights

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

2. Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the ... the board of conciliation and arbitration ... including without limitation those set forth in chapter 23C, chapter 150, chapter 150A, and chapter 150E of the General Laws."