

TOWN OF WHITMAN AND TOWN HALL EMPLOYEES ASSOCIATION AND AFSCME, COUNCIL 93,  
AFL-CIO, MCR-3867 (8/8/89). RULING ON CHALLENGED BALLOT.

43.31 challenged ballot  
43.8 voter eligibility

Commissioners Participating:

Paul T. Edgar, Chairman  
Maria C. Walsh, Commissioner

Counsel:

- Eileen Glynn - Representing the Town Hall Employees Association
- Wayne Soini, Esq. - Representing AFSCME, Council 93, AFL-CIO
- William Thibeault - Representing the Town of Whitman

RULING ON CHALLENGED BALLOT

Statement of the Case

On January 25, 1989, the Town Hall Employees Association (Association or Employer) filed a petition with the Labor Relations Commission (Commissioner) to represent a bargaining unit of "all Town Hall employees (non-professionals) [including] custodial, secretarial, clerical and assistant to the Treasurer, excluding the Veterans Agent, Town Accountant and all other employees of the Town of Whitman currently represented by AFSCME, Council 93, AFL-CIO" (AFSCME or Employer). Pursuant to an Agreement for Consent Election approved by the Commission on March 28, 1989, an election was held in this bargaining unit on April 27, 1989.

The question to be determined by the election was: "[Do you] desire to be represented by: the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO; the Town Hall Employees Association, or No Employee Organization?" The certified results were as follows:

In the Agreement for Consent Election, the parties stipulated to the following bargaining unit: All Town Hall Employees (Non-Professionals) custodial, secretarial, clerical and assistant to the Treasurer, excluding the Veterans Agent, Town Accountant and all other employees of the Town of Whitman. The bargaining unit description is identical to the description of a bargaining unit that the Commission certified in 1974 (MCR-1390), heretofore represented by AFSCME.



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 AFL-CIO, 16 MLC 1248

Total ballots cast.....10  
 Ballots cast for AFSCME, Council 93... 4  
 Ballots cast for Town Hall Employees  
 Association..... 5  
 Challenged ballots..... 1  
 Ballots for no employee organization.. 0  
 Blank and void ballots..... 0  
 Protested ballots..... 0

During the election, the eligibility of one voter, Robert J. Luddy, a part-time custodian in the Police Department, was challenged by the Commission because his name did not appear on the election eligibility list. Mr. Luddy's eligibility so was challenged by both the Town Hall Employees Association and the Town on the grounds that the position does not properly belong in the bargaining unit. The outcome of this individual is outcome determinative.

On May 19, 1989, an informal conference was held to determine whether the challenge to the eligibility of the Police department custodian should be sustained on the ground that the position is not properly included in the bargaining unit, or whether the challenge should be overruled and the ballot opened and counted. In lieu of a hearing, all parties agreed to a stipulated record on July 28, 1989.<sup>2</sup> AFSCME, the Town and the Association filed position statements on July 18, 21 and 28, 1989, respectively.

Findings of Fact<sup>3</sup>

We adopt the factual stipulations of the parties and find the following facts. The incumbent represents a bargaining unit composed of clerical and

<sup>2</sup>

The parties stipulated to the following record:

1. Stipulated facts dated May 30, 1989.
2. Town Exhibits Nos. 1-15, which were submitted with a letter dated June 1989.
3. Articles III, IV and XX of the contract between AFSCME and the Town effective July 1, 1987 through June 30, 1989.
4. Article XX of the contract between AFSCME and the Town effective roughly 1982.
5. Memorandum of the Town Treasurer to the Acting Town Manager dated March 1989 listing employees who pay union dues.
6. A stipulation that during the contract negotiations for the last two contracts between AFSCME and the Town the position of part-time custodian in the Police Department was not discussed or specifically listed in the negotiated contracts.

<sup>3</sup>

No party contests the Commission's jurisdiction over this action.



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lial employees. Article III of the collective bargaining agreement between  
and the Town, effective for the period July 1, 1987 through June 30, 1989,  
in pertinent part that:

The Employer recognizes the Union as the sole and exclusive bargaining  
agent for the purposes of establishing salaries, wages, hours and other  
specified conditions of employment as contained in this Agreement for:

UNIT A: All full-time and permanent part-time clerical employees of  
the Town Hall, excluding the Board of Selectmen's Secretary as certi-  
fied, or additional secretary employed in the Selectmen's office, and  
the Department of Public Works Secretary. A permanent part-time  
employee is defined as an employee who is regularly scheduled to work  
twenty or more hours per week.

UNIT B: CUSTODIAN/MAINTENANCE POSITION

The July 1, 1980 through June 30, 1982 collective bargaining agreement  
n AFSCME and the Town provided for part-time custodial wages. It was the  
ontract between the parties to mention part-time custodial wages. There has  
o mention of a part-time custodian position in any AFSCME contract since  
which includes the recently negotiated contract which would have been effec-  
rom July 1, 1989 through June 30, 1992. During the contract negotiations for  
st two contracts between AFSCME and the Town, the position of part-time cus-  
in the Police Department was not discussed or specifically listed in the  
ated contracts. Nor has there been any request on the part of AFSCME to  
negotiations to include a provision for a part-time custodian.

Many Town department heads, including the Police Chief, have complete auth-  
for running their departments, including the right to hire, to fire and to  
line their employees.

Robert J. Luddy is a custodian who works part-time twenty hours weekly  
the Police Department annex to the Town Hall building. The Police Chief  
s Mr. Luddy in his daily duties, and has the authority to fire and discipline  
Mr. Luddy's wages and benefits are not established pursuant to the AFSCME  
tive bargaining agreement with the Town, but have been individually nego-

The Town Hall custodian is a bargaining unit position. The Town Hall cus-  
Mr. Roberts, is responsible for the maintenance and upkeep of the Town  
responds to emergencies, and secures the building. He works under the direc-  
f the Town Business Manager, who recommends to the Board of Selectmen whether  
e, fire and discipline the Town Hall custodian. The part-time custodian in  
lice Department performs essentially the same duties of upkeep and mainte-  
that the Town Hall custodian performs. The full-time Town Hall custodian  
from 7:45 a.m. to 4:45 p.m. Monday through Friday. The part-time custodian



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ks from 7:45 a.m. to 4:45 p.m. Monday through Friday. The part-time custodian  
the Police Department works from 7:20 a.m. to 11:30 a.m. Monday through Friday.  
Town Hall custodian wears a uniform pursuant to the collective bargaining  
ement; the custodian in the Police Department does not wear a uniform.

When approved by the Chief of Police, Mr. Luddy helps the full-time custo-  
n perform his duties at the request of Mr. Roberts, and on occasion works up to  
ty hours per week filling in for the full-time custodian during vacation or sick  
ve. Mr. Luddy is paid for his part-time work in the Police Department from  
ropriations budgeted for the Police Department. A separate non-Police Depart-  
t appropriation of approximately \$1,766 is budgeted for sick, vacation and  
-time costs for the full-time custodian. If Mr. Roberts is sick or on vacation  
Luddy is usually asked first if he would like to fill in for the full-time  
odian and is paid for the additional work from the non-Police Department  
get. If Mr. Luddy is unavailable, someone else is offered the work.

Pursuant to the current contract between AFSCME and the Town, Article IV  
ires each member of the bargaining unit to pay either Union dues or an Agency  
vice Fee (ASF). Mr. Luddy has not paid either Union dues or an ASF from 1986 to  
resent. Mr. Luddy has not been a member of AFSCME since 1986,<sup>4</sup> although he  
d, by signed authorization card dated March 16, 1989, to have his dues deducted  
his paycheck. AFSCME has been aware of the position of part-time custodian in  
olice department since 1986. Presently the Town is collecting agency service  
; or dues from other part-time employees in the bargaining unit.

Neither the Town nor AFSCME has filed a CAS petition with the Commission  
ude or exclude the position of part-time custodian in the Police Department.  
e are other Town Hall job classifications that are not currently recognized as  
: of any bargaining unit, and they include: the newly created part-time (20  
s) clerical position in the Council On Aging, the full-time clerical position  
he Police Department, and all the Library employees.<sup>5</sup>

#### Decision

The issue before the Commission is whether the part-time custodian position  
he Police Department should be excluded from the bargaining unit described in  
note 1. We sustain the challenge to the eligibility of this position and hold  
the part-time custodian position in the Police Department should be excluded  
the bargaining unit for the purposes of this election.

<sup>4</sup> Prior to 1986 Mr. Luddy held a different position with the Town.

<sup>5</sup> During the summer of 1989, the Library employes moved out of the Town Hall  
into a separate Library facility.



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The language of the original 1974 bargaining unit certification, unchanged to the present, is clear and unambiguous. The certification includes all Town Hall employees, specifically mentioning custodial employees among others. This unit has existed since 1974, and is the unit that the Association petitioned to represent. The part-time custodial position in the Police Department has never been included in the certified unit, and therefore was not part of the petitioned-for unit.

The history of this bargaining unit demonstrates the stability of the bargaining relationship with the Town. The current recognition clause reflects the bargaining unit as is listed in the original certification. During the negotiations for the last two contracts between AFSCME and the Town, the inclusion of part-time custodian in the Police Department was never discussed. The part-time custodian was not included in the negotiated contracts, although both the Town and the Union have been aware of the existence of this position since at least 1986. The Union, neither party has requested that negotiations be reopened to include the Police Department custodian. There is no evidence that the parties ever intended to include the part-time custodian position in the Police Department as part of the bargaining unit. For example, although Article IV of the contract requires each employee of the bargaining unit to pay either Union dues or an Agency Service Fee, the Police Department custodian never has been asked to pay either.

The existing unit is an "appropriate" bargaining unit although it may not be the most appropriate unit.<sup>6</sup> The contested position was not included in the original unit, nor has it ever been added to the unit by subsequent agreement of the parties. Therefore it was not included in the unit to which the parties previously agreed and which we approved. Thus, we conclude that for the purpose of this case, the part-time custodian in the Police Department is excluded from the bargaining unit.

#### CONCLUSION

On the basis of the foregoing, we conclude that for the purpose of this case, the part-time custodian in the Police Department is excluded from the bargaining unit. Therefore, we order that Robert Luddy is ineligible to vote in the representation election and, accordingly, his ballot should not be opened and counted. The results of the secret ballot election are as follows:

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<sup>6</sup> Nothing in our decision precludes any party from filing a timely CAS petition in the future concerning the unit placement of any position, including the Police Department custodian.

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Total ballots cast.....	10
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Challenged ballots.....	0
Ballots for no employee organization.	0
Ballots cast by ineligible voter.....	1
Blank and void ballots.....	0
Protested ballots.....	0

Therefore, by virtue of and pursuant to the power vested in the Commission Section 4 of Chapter 150E of the General Laws, IT IS HEREBY CERTIFIED that a majority of the eligible voters have selected the Town Hall Employees Association for the purposes of collective bargaining. Pursuant to the Commission's rules and regulations, an amended certification of results will issue.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN

MARIA C. WALSH, COMMISSIONER

