

In the Matter of CITY OF BOSTON

and

BOSTON POLICE DETECTIVES BENEVOLENT  
SOCIETY

and

SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 888

Case No. MCR-06-5205

- |       |   |
|-------|---|
| 14.   | <i>Professional Employees</i>                         |
| 34.93 | <i>severance</i>                                      |
| 35.3  | <i>inclusion of professionals and craft severance</i> |
| 35.6  | <i>professionals</i>                                  |
| 43.14 | <i>inclusion of professionals and craft severance</i> |

September 9, 2009

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

Stephen B. Sutliff, Esq.	Representing the City of Boston
Paul T. Hynes, Esq.	Representing the Boston Police
John F. McMahon, Esq.	Detectives Benevolent Society
Alfred Gordon, Esq.	Representing the Service
	Employees International Union,
	Local 888

## DECISION AND DIRECTION OF ELECTION<sup>1</sup>

### Statement of the Case

On April 10, 2006, the Boston Police Detectives Benevolent Society (BPDBS or Petitioner) filed a petition with the former Labor Relations Commission (Commission) seeking to represent certain employees of the City of Boston (Boston) who are currently represented by the Service Employees International Union, Local 888 (SEIU or Intervenor). The SEIU filed a motion to intervene on May 8, 2006. The former Commission allowed that motion on May 25, 2006.

On June 28, 2006, August 7, 8, and 9, 2006, Hearing Officer Ann T. Moriarty, Esq. (Hearing Officer) conducted a hearing at which all parties had the opportunity to be heard, to examine witnesses, and to introduce evidence.<sup>2</sup> The BPDBS and SEIU filed post-hearing briefs on September 15, 2006. On May 11, 2007, the BPDBS filed a Motion to Supplement its Brief (Motion) to add two citations to reported Board decisions. The SEIU filed an opposition to the Motion on May 15, 2007. The Board grants the Motion, and,

therefore, has considered the information contained in the Motion and in the Union's opposition to the Motion.

The face of the petition reflects that BPDBS seeks to represent a separate unit comprised of the positions of: senior criminalist, criminalist, supervising forensic technologist, forensic technologist, forensic laboratory technician, and forensic evidence technician, all of whom are currently part of a city-wide bargaining unit. In its post-hearing brief, the Petitioner contends that the petitioned-for unit consists of professional employees within the meaning of Section 1 of MGL c. 150E (the Law) who were melded into SEIU's unit through voluntary recognition without a majority vote to be included in a bargaining unit with non-professional employees contrary to Section 3 of the Law. The Petitioner argues that Section 3 of the Law mandates an election under these circumstances. SEIU seeks dismissal of the petition on several grounds, including that the petitioned for group of employees does not meet the Board's well-established severance criteria. The City takes no position on the appropriateness of the petitioned-for bargaining unit.

For the reasons set forth below, the Board holds that those petitioned-for employees that meet the statutory definition of a professional employee are entitled to an election to determine whether they wish to be included in an overall unit that includes both professional and non-professional employees. If a majority of these professional employees vote to separate from the non-professional employees, then they are also entitled to a vote to determine whether they desire to be represented by the BPDBS or the SEIU, or by no union at all.

### Parties' Stipulations

The City, the BPDBS, and the SEIU stipulated to the following facts:

1. The City of Boston (City) is a public employer within the meaning of Section 1 of MGL c. 150E (the Law).
2. The Boston Police Detectives Benevolent Society (BPDBS) is an employee organization within the meaning of Section 1 of the Law.
3. The Service Employees International Union, Local 888 (SEIU) is an employee organization within the meaning of Section 1 of the Law.
4. On April 10, 2006, the BPDBS filed a petition with the Labor Relations Commission (Commission) seeking to represent certain employees of the City who work in the Boston Police Department (BPD) and who are currently represented by SEIU for the purposes of collective bargaining.
5. By its petition, the BPDBS seeks to represent employees in the following job titles in a separate bargaining unit: senior

1. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." References in this decision to the Commonwealth Employment Relations Board (Board) include the former Labor Relations Commission (Commission). Pursuant to Section 13.02(1) of the Commission's Rules in effect prior to November 15,

2007, the Commission designated this case as one in which the Commission shall issue a decision in the first instance.

2. On July 31, 2007, the BPDBS filed a request that the Hearing Officer and the parties view the Boston Police Department's Crime Laboratory and Latent Print Unit (the Request). The SEIU opposed the Request. The City took no position on the Request. The former Commission denied the Request on August 7, 2007.

criminalist, criminalist, supervising forensic technologist, forensic technologist, forensic laboratory technician, and forensic evidence technician.

6. The City and SEIU are parties to a collective bargaining agreement that is effective from July 1, 2005 through September 30, 2006 [Clerks and Techs Agreement].

7. The wages, hours, and other terms and conditions of employment for the petitioned-for employees are contained in the Clerks and Techs Agreement.

8. The BPDBS's petition is timely filed under the Commission's rules and regulations and Commission case law.

9. The incumbents of the following positions are professional employees within the meaning of Section 1 of MGL c. 150E (the Law): senior criminalist, criminalist, supervising forensic technologist, and forensic technologist.

10. Superintendent Paul Joyce (Joyce) is the head of the BPD's Bureau of Investigative Services. Joyce reports directly to Superintendent-in-Chief/Acting Police Commissioner Al Goslin.

11. Captain Detective Thomas Dowd (Dowd) heads the Forensic Group that is part of the BPD's Bureau of Investigative Services. The Forensic Group includes the Crime Laboratory Unit (Crime Unit) and the Latent Print Unit (Print Unit). Dowd reports directly to Joyce.

12. Donald R. Hayes, Jr. (Hayes) is the Director of the BPD's Crime Unit and the DNA laboratory technical leader. Hayes is not included in any bargaining unit for the purposes of collective bargaining. Hayes reports directly to Dowd.

13. In addition to Hayes, the Crime Unit is staffed with four senior criminalists, six criminalists, one supervising forensic technologist (quality manager), one forensic technologist, one forensic laboratory technician, and one forensic evidence technician.

14. Jennifer Hannaford (Hannaford) is the Director of the Print Unit. Hannaford is not included in any bargaining unit for the purposes of collective bargaining. Hannaford reports directly to Dowd.

15. In addition to Hannaford, the Print Unit is staffed with two senior criminalists and four criminalists.

16. The BPDBS represents two bargaining units of detectives for the purposes of collective bargaining. One bargaining unit consists of all detectives but excluding superior officer detectives. The other bargaining unit consists of superior officer detectives. Dowd is included in the BPDBS's superior officer detectives bargaining unit.

17. As a result of jurisdictional hearings conducted by the Service Employees International Union and a vote of the SEIU Massachusetts membership, SEIU chartered Local 888 effective August 4, 2003. Local 888 consists of portions of several former SEIU lo-

cal, including Local 285, and now represents the bargaining unit to which the petitioned-for employees currently belong and has represented it continuously since August 4, 2003.

18. The incumbents in the positions identified as professional in Labor Relations Commission Case No. MCR-4148 are professional employees within the meaning of Section 1 of MGL c. 150E (the Law).<sup>3</sup>

19. The job postings for the positions of:

Director, Latent Prints (JX7),  
Director, Criminalistic Services (JX10),  
DNA Technical Leader (JX11)

are a fair and accurate description of the job duties and responsibilities and the educational requirements for the incumbents of the positions.

20. The job postings for all other positions (JX8, JX9, and JX 12 through and including JX 20) are a fair and accurate description of some of the job duties and responsibilities and the educational requirements for the incumbents of the positions except to the extent that they describe or specify the supervision exercised or received by the incumbents.

21. As a result of a reorganization by the City, the SEIU positions in the service of the City's Public Facilities Department, covered by the Certification in Case No. MCR-4148, *City of Boston*, became positions of the Department of Neighborhood Development in 2002.

22. The employees sought by this petition are the only professional employees within the meaning of Section 1 of the Law whose terms and conditions of employment are contained in the SEIU Clerks & Techs collective bargaining agreement- JX2.

23. At no time did the professional employees, within the meaning of Section 1 of the Law, who now hold or ever held a professional position in the petitioned-for bargaining unit have an opportunity pursuant to Section 3 of the Law to vote in an election to determine whether a majority of such professional employees wish to be included in a bargaining unit that includes non-professional employees.

#### Findings of Fact<sup>4</sup>

The following facts are based on testimonial and documentary evidence.

#### *SEIU and the City—1967-2006*

In March of 1967, the City recognized SEIU as the exclusive collective bargaining representative for certain non-professional employees in numerous City departments, including certain department of health and hospital employees who worked at the Boston City Hospital, all civilian employees in the signal service section, administration section, and all hostlers in the police department (Clerical-Technical Unit). Since 1967, the City has recognized

3. See Appendix "B".

4. The Board's jurisdiction is not disputed.

SEIU as the exclusive representative of certain other employees and added these positions to the Clerical-Technical Unit. For example, at some point prior to May of 1992, the City recognized SEIU as the exclusive representative of certain persons working in its department of health and hospitals, including those holding the positions of medical social worker, medical social worker supervisor, psychiatric social worker, psychiatric social worker supervisor, and rehabilitation counselor.

In May of 1992, the former Commission approved two Agreements for Consent Add-On Elections (Consent Agreements) to SEIU's Clerical-Technical unit.<sup>5</sup> One of the Consent Agreements directed a secret ballot election to determine whether a majority of certain non-professional and non-supervisory employees employed by the City's public facilities department (Unit A) desired to be added to SEIU's Clerical-Technical Unit of professional, clerical and technical employees.<sup>6</sup> The other Consent Agreement provided for a secret ballot election to determine whether a majority of certain professional and supervisory employees employed in the same public facilities department (Unit B) desired to be added to SEIU's Clerical-Technical Unit of professional, clerical and technical employees.<sup>7</sup> In both Consent Agreements, the City and SEIU stipulated that the proposed additions to the existing bargaining unit described in Article 1 of the collective bargaining agreement between the City and SEIU would create an appropriate collective bargaining unit of all full-time and regular part-time professional, clerical and technical employees.<sup>8</sup>

Pursuant to the Consent Agreements, the former Commission conducted secret ballot elections in late August of 1992. In early September of 1992, the City filed Objections to the Conduct of the Election in Unit B on the ground that the former Commission denied the identified professional employees an opportunity to decide whether they desired to be included in a bargaining unit that includes both professional and nonprofessional employees.<sup>9</sup> In a ruling dismissing the objections, the former Commission rejected the City's claim that it could raise the interests of third parties and concluded that the City was estopped from challenging the Agreement for Consent Election that it freely signed. *City of Boston*, 19 MLC 1501 (1992). The Commission issued a Certification of Representatives for Unit A and Unit B on November 4, 1992.

#### *SEIU's Clerical-Technical Agreements 1993-2006*

After the addition of the public facilities department employees to SEIU's bargaining unit in November of 1992, the City and SEIU changed Section 1 and Section 3 of Article 1 of their collective bar-

gaining agreement, for the period July 1, 1993 through June 30, 1996 (1993-1996 Clerks and Techs Agreement) to read, in relevant part, as follows:

#### Article I - Persons Covered By This Agreement

Section 1. The City recognizes the Union as the exclusive representative for the purpose of collective bargaining relative to wages, hours and other conditions of employment, of the following employees: ...

(b) All employees in the service of the City of Boston Public Facilities Department covered by Certification No. MCR-4148 dated November 4, 1992 and Senior Budget Analyst and Senior Business Enterprise Manager. ...

Section 3. The City and the Union agree that employees in the service of the City's Public Facilities Department covered by Certification No. MCR-4148 and Senior Budget Analyst and Senior Business Enterprise Manager are governed by the terms and conditions contained in a separate and distinct memorandum of agreement attached hereto as Appendix A.

The recognition clause of the clerical-technical collective bargaining agreement for the period July 1, 1996 through June 30, 1999 (1996-1999 Clerks and Techs Agreement) removed the language that appeared in Section 1(b) of Article I in the 1993-1996 Clerks and Techs Agreement and inserted a new Section 1(b) to reflect, in part, the movement of the municipal police division employees from the public facilities department to the property management department. Section 1(b) of Article I of the 1996-1999 Clerks and Techs Agreement provides:

#### Article I - Persons Covered By This Agreement

Section 1. The City recognizes the Union as the exclusive representative for the purpose of collective bargaining relative to wages, hours and other conditions of employment of the following employees: ...

(b) All employees in the service of the Property Management Department, Municipal Police Division in clerical/technical titles including the titles of Operations Manager, Data Specialist, Auto Maintenance Mechanic, Computer Operator, Senior Computer Operator, Shift Supervisor, Senior Shift Supervisor, Communication Specialist, Alarm Specialist, Alarm Technician, Manager of Security Systems, Research Clerk and Executive Secretary, but not to include managerial or confidential employees.<sup>10</sup>

These municipal police division employees were added to SEIU's unit in November of 1992, but were covered previously by a separate, distinct collective bargaining agreement. Section 3 of Article 1 of the 1996-1999 Clerks and Techs Agreement is identical to

5. See Case No.: MCR-4148, *City of Boston and Local 285, Service Employees International Union, AFL-CIO*.

6. A list of the positions in Unit A, as it appears in the Agreement for Consent Add-On Election is appended to this decision [not published]. See Appendix A.

7. A list of the positions in Unit B, as it appears in the Agreement for Consent Add-On Election with the letter (P) identifying the City and SEIU's agreement regarding the professional employees in Unit B, is appended to this decision [not published]. See Appendix "B".

8. Article 1 of the collective bargaining agreement in effect at the time of the parties' stipulation provides, in part, that the City recognizes SEIU as the exclusive representative of: a) all employees covered by the March of 1967 recognition

agreement; b) certain persons employed in the youth activities commission; c) certain persons employed in the department of health and hospitals; and d) certain persons employed in the City's rent control administration.

9. The Board uses the term "Globe" ballot to describe the secret ballot election procedure it uses to provide professional employees with the opportunity to decide whether they desire to be included in a bargaining unit that includes both professional employees and non-professional employees. *City of Boston*, 19 MLC 1501, 1502, n. 4 (1992) (citing *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937)).

10. The municipal police division titles listed were included in either Unit A or Unit B of the 1992 Agreements for Consent Add-On Election in Case No. MCR-4148, *City of Boston*.

Section 3 of Article 1 of the 1993-1996 Clerks and Techs Agreement.

The language of Section 1 and Section 3 of Article 1 - *Persons Covered By This Agreement* that appears in the 1996-1999 Clerks and Techs Agreement is the same language that appears in each successor collective bargaining agreement, including the clerical-technical agreement for the period July 1, 2005 through September 30, 2006. (2005-2006 Clerks & Techs Agreement). As of May 8, 2006, there are about 691 employees whose terms and conditions of employment are covered by the 2005-2006 Clerks & Techs Agreement. In addition to the petitioned-for positions at issue in this dispute and the municipal police positions, the employees covered by the Clerks & Techs Agreement include a wide variety of non-professional employees: BPD communication equipment operators, administrative assistants, administrative secretaries, head account clerks, head administrative clerks, head clerks, principal clerks, and principal accountants in various departments, police clerks and typists, police dispatchers, hostlers, building custodians, and drawtenders.<sup>11</sup>

*SEIU's Public Facilities/Department of Neighborhood Development Agreements 1993-2006*

Since the addition of the public facilities department employees to SEIU's clerical-technical bargaining unit in November of 1992, the City and SEIU have negotiated and entered into successive, separate and distinct collective bargaining agreements for the public facilities department employees. Article 1 of the first contract covering these employees for the period July 1, 1993 through June 30, 1996 (1993-1996 Public Facilities Agreement) provides as follows:

**Article 1 - Persons Covered By This Agreement**

**Section 1.** The City recognizes the Union as the exclusive representative for the purpose of collective bargaining relative to wages, hours and other conditions of employment, of the following employees:

- (a) All employees in the service of the City of Boston Public Facilities Department covered by Certification No. MCR-4148 dated November 4, 1992 and Senior Budget Analyst and Senior Business Enterprise Manager.

The language of Article 1 - *Persons Covered By This Agreement* that is in the 1993-1996 Public Facilities Agreement is the same language that appears in each successor agreement, including the collective bargaining agreement covering July 1, 2005 through September 30, 2006 (2005-2006 DND Agreement). As of June 20,

2006, there are about 131 employees whose terms and conditions of employment are covered by the 2005-2006 DND Agreement.<sup>12</sup>

*SEIU - City Simultaneous and Joint Negotiations for Four 2005-2006 Contracts Including the 2005-2006 Clerks & Techs Agreement and 2005-2006 DND Agreement and Two Other Contracts*<sup>13</sup>

Four collective bargaining agreements, the 2005-2006 Clerks & Techs Agreement, the 2005-2006 DND Agreement, and two other contracts, one covering employees of the Boston Center for Youth and Families and the other covering employees of the Boston Elderly Commission, are the product of separate and joint negotiations between the City and SEIU. Specifically, the City and SEIU first negotiated separately over the terms and conditions of employment applicable to the employees covered by that specific contract. For these separate but simultaneous negotiations with the City, SEIU employed four different bargaining teams composed, in substantial part, of employees who are covered by the specific contract. For example, for the Clerks & Techs Agreement, the SEIU's bargaining team included about six representatives elected by the unit members working at City Hall, six representatives elected by the unit members working at the BPD, including a criminalist, and two representatives elected by the unit members working at Frontage Road.<sup>14</sup> The negotiations at these four different tables could also be further broken down by the parties agreeing to side table negotiations to address certain issues applicable only to a group of employees covered by that specific contract. For example, during the negotiations for the Clerks & Techs Agreement, the Union requested and the City agreed to engage in side table negotiations over a single issue concerning approximately twenty-five employees working in the municipal police department.<sup>15</sup>

When these four separate but simultaneous negotiations were nearing conclusion, SEIU selected a single bargaining team from the membership of the four separate teams and negotiated with the City over the terms and conditions of employment held in common by all the employees covered by all four contracts, like cost of living raises, residency requirements, and an affordable housing trust fund. After the City and SEIU reached an agreement on all four contracts, SEIU notified its membership of the content of the four contracts by using four different information notices. The employees covered by the four contracts voted separately during the contract ratification balloting, and SEIU counted their ballots for ratification separately. The employees ratified all four contracts and the City funded the contracts. Sullivan explained that if any of the four separate voting groups had failed to ratify their respective contract, the SEIU would not have signed that contract.

11. A list of all positions whose terms and conditions of employment are covered by the 2005-2006 Clerks & Techs Agreement as of May 8, 2006 is appended to this decision [not published]. The list is arranged by job title in alphabetical order and contains the number of employees in each job title. See Appendix C.

12. A list of all positions whose terms and conditions of employment are covered by the 2005-2006 DND Agreement as of June 20, 2006 is appended to this decision [not published]. The list is arranged by pay grade in ascending order and contains the number of employees in each job title. See Appendix D.

13. The negotiations for these four contracts were on-going since at least 2003 and resulted in four separate contracts covering 2002 to 2005 and the four separate

2005-2006 contracts. The 2005-2006 contracts include all the negotiated salary increases, effective from July 1, 2002.

14. The Frontage Road location includes about twenty-five clerical/technical employees working in the City's Property Management Department, Municipal Police Division. These employees were transferred from the public facilities department to the property management department in the mid-1990s.

15. The side table negotiations involved the movement of these twenty-five employees in the municipal police department to the same salary schedule of all other employees covered by the Clerks & Techs Agreement. The parties did not reach an agreement on this issue.

The Clerks & Techs Agreement and the separate DND Agreement contain some identical provisions such as residency requirements, non-discrimination clauses, payroll deduction of union dues and agency service fee, management rights and no-strike clauses, safety and health language, training and career ladders, employer provision of information language, and duration clauses. Further, the contractual provisions in the two agreements governing grievance procedures, leaves of absence, and union business are substantially similar. Other provisions are different, like discipline and discharge, seniority, hours of work and overtime, temporary service/promotions, layoff and recall, performance evaluation, and the salary schedule. The two Agreements also contain side letters that are the same and side letters that address only the terms and conditions of employment of the covered employees, like specific position upgrades. Both agreements were signed on August 15, 2004. The Clerks & Techs Agreement includes the signatures of its respective SEIU bargaining team and the DND Agreement includes the signatures of its respective SEIU bargaining team as well as the signature of the Director of the DND.

SEIU has established four chapters to meet and to communicate with its membership who are covered by both the Clerks & Techs Agreement and the DND Agreement. The four chapters are defined by the employees' work locations, City Hall, the BPD headquarters, Frontage Road, and the DND. SEIU holds the union chapter meetings at these work locations. SEIU does not regularly conduct union meetings that all the employees covered by both the Clerks & Techs Agreement and the DND Agreement are invited to attend. SEIU uses the same process for deciding whether to take a grievance to arbitration for all its bargaining units.

In January of 2006, the SEIU notified the City of its desire to start negotiations for successor agreements to all four contracts. Bargaining for these contracts was to be conducted in the same manner in which the parties conducted the negotiations that led to the four separate contracts covering 2002 to 2005 and the four separate 2005-2006 contracts. More specifically, the City and the SEIU would engage in four separate but simultaneous negotiations on the issues concerning only those employees covered by a specific contract, and then joint negotiations on the issues in common for all the employees covered by all four separate contracts. Prior to the start of the successor contract negotiations in March of 2006, SEIU distributed nomination forms for membership on the respective bargaining teams, including the team for a successor to the 2005-2006 Clerks & Techs Agreement. The same criminalist in the Print Unit was again placed on the SEIU bargaining team.

In addition, prior to the start of these successor contract negotiations, SEIU sent a survey to all the employees covered by the contracts and asked the employees to identify their concerns and those economic benefits they would like to see in the next contract and to rank them in order of importance. This survey approach to bargaining is used by SEIU in all of its bargaining units. Based on the

employees' responses, SEIU formulates its bargaining proposals. In response to this survey or through other means, the employees in the Crime Unit and the Print Unit raised certain issues with SEIU, such as specialty pay, education incentive pay based on the degree(s) held by the individual, and health and safety issues such as the need for bullet proof vests at crime scenes and adequate protections from bio-hazardous materials at crime scenes and in the crime laboratory.<sup>16</sup>

#### *BPD's Forensic Group - Petitioned-For Civilian Employees*

Captain Detective Thomas Dowd (Dowd) heads the BPD's Forensic Group, which is part of the BPD's Bureau of Investigative Services. Dowd reports directly to the head of the BPD's Bureau of Investigative Services, who in turn reports directly to Superintendent-in-Chief/Acting Police Commissioner. All BPD detectives are in the Bureau of Investigative Services. The Forensic Group includes the Crime Laboratory Unit (Crime Unit) and the Latent Print Unit (Print Unit). Both units are located in the same secure wing on the second floor of the BPD's headquarters, One Schroeder Plaza; their respective case intake windows are within sight of each other. The Crime Unit's laboratory has various levels of security, including a separate key card access to enter the laboratory where the staff's administrative offices are located, as well as the different laboratories, serology and criminalistics, DNA, and trace. The Crime Unit's work area also includes keyed evidence lockers for off-hour drop-off of physical evidence, a chemical room to store flammables and acids, and an evidence area that has a key card entry and exit.

The BPD has a human resources department located in the BPD headquarters where both sworn officers and all BPD civilian employees, including the petitioned-for employees, are directed for information about their respective employment benefits. The BPD also has its own labor relations office in addition to the City's Office of Labor Relations located in City Hall.

#### *Crime Unit*

Donald R. Hayes, Jr. (Hayes) is the Director of the BPD's Crime Unit and the DNA laboratory technical leader.<sup>17</sup> Hayes is not included in any bargaining unit for the purposes of collective bargaining. Hayes reports directly to Dowd. In addition to Hayes, the Crime Unit is staffed with four senior criminalists, six criminalists, one supervising forensic technologist (quality manager), one forensic technologist, one forensic laboratory technician, and one forensic evidence technician. The Crime Unit staff regularly and routinely interacts with the BPD detectives assigned to the districts, the major case bureau, the homicide unit, the sexual assault unit, and the internal affairs unit. The detectives submit the physical evidence to the Crime Unit for analysis and the Crime Unit provides the detectives with the results of the testing of the submitted evidence. The results may provide the requisite information necessary for the detective(s) to apply for and secure a search warrant.

16. The record also contains information about certain conduct of the City, SEIU, and the petitioned-for employees, including conduct at the Clerks & Techs successor bargaining table that occurred after April 10, 2006, the date this petition was filed. It is unnecessary to include this information in these factual findings, however, because it is not material to the outcome of this unit determination case.

17. Hayes has worked for the City in its crime laboratory since 1987. Over the course of his employment with the City, first as a forensic technologist, then a criminalist and a senior criminalist, the terms and conditions of his employment have been covered by the Clerks & Techs agreement then in effect, until his appointment as the Crime Unit's Director in 1997.

Senior criminalists and criminalists prepare reports based on the analysis of the physical evidence and testify in court about the results. If a case has been scheduled for trial, the senior criminalist and/or criminalist who processed the physical evidence in that case will work with the assigned assistant district attorney prior to and during the trial. During calendar year 2005, 805 cases were submitted to the Crime Unit for analysis. Cases range from one item to hundreds of items for examination, documentation, and analysis.

The crime laboratory is accredited by the American Society of Crime Laboratory Directors, Laboratory Accreditation Board (ASCLD LAB) in all disciplines. Prior to this full accreditation in 2002, the crime laboratory sought and received accreditation for DNA analysis in 1998 through the National Forensics Testing Center (NFSTC). As a fully accredited laboratory, the employees who examine and test the physical evidence must possess, at minimum, a bachelor's degree in a scientific discipline, like biology or chemistry. Certain positions in the crime unit require either a master's degree or specific coursework in molecular biology or biochemistry to perform certain tests, like DNA analysis. The senior criminalists, criminalists, the supervising forensic technologist (quality manager) and the forensic technologist possess and are required to possess at hire, at minimum, a bachelor's degree in a scientific discipline. The forensic laboratory technician has a bachelor's degree, but the education/experience required at hire is an associate's degree or higher with a major in a scientific discipline. In addition, the entry requirements for the forensic laboratory technician permit prior forensic laboratory experience to substitute for the associate's degree. The forensic evidence technician does not possess, nor does the position require at hire, a degree beyond high school.

The crime laboratory is divided into four sections: DNA, serology, criminalistics, and trace evidence. Each of the four sections is staffed with a senior criminalist, who is the senior scientist in that specific discipline, and who possesses the requisite education, training, and experience to manage the section work, including ensuring that quality control and quality assurance protections are in place, are current, and are followed in their respective section. For example, in the serology section, which processes sexual assault physical evidence, including semen, blood and saliva screening tests, the senior criminalist audits the section work with the quality manager, tracks the number of cases processed, maintains the temperature charts, implements new procedures, and reviews case files, among other things. Senior criminalists spend between twenty to thirty percent of their time performing these oversight and quality control duties. Senior criminalists devote between seventy to eighty percent of their time to their own casework, analyzing and testing evidence, reaching scientific conclusions about that evidence, preparing reports, interacting with detectives and district attorneys, and testifying in court.

Senior criminalists do not have the authority to transfer, suspend, lay-off, recall, promote, discharge, assign, or discipline employees.

Hayes possesses the authority to discipline a Crime Unit employee as well as the BPD command staff, including Dowd. Hayes has been the Director of the Crime Unit since 1997 and he has not disciplined any Crime Unit staff member during his tenure. Hayes also has the authority to promote employees. When considering a candidate for promotion, Hayes discusses the candidate's qualifications and work performance with the senior criminalists. The senior criminalists have also approached Hayes to recommend a candidate for promotion. Hayes has considered the senior criminalists' recommendations and his promotional decisions have concurred with the senior criminalists' view of the candidate(s).

The Crime Unit has a written job evaluation system in place and Hayes evaluates all the employees in that unit. Hayes requests the input of the senior criminalists into the evaluation process. For example, the senior criminalist in the serology section explained that her role in the evaluation process is informing Hayes of any accomplishments of the criminalists that he may not be aware of, including extra projects that they may have worked on, or exceptional work on a specific case. As the senior scientists in each of the four sections, the senior criminalists are in a position to mentor and train other employees in the laboratory. When Hayes evaluates the criminalists, the senior criminalists participate in the discussions during the meeting Hayes has with the criminalists, and both Hayes and the senior criminalist sign the criminalist's evaluation form. Criminalists do not participate in this evaluation process for other Crime Unit employees. These written performance evaluations are considered when a promotional opportunity is available in the unit.

Eileen Walsh (Walsh), the senior criminalist in the criminalistics section of the Crime Unit, assigns all the cases that come into the crime laboratory, except for the high priority cases where Hayes assigns the priority to the testing and makes the case assignment. Cases are first evaluated for the investigative potential of the evidence and assigned on a priority basis. For example, if there is a biological sample from which a DNA profile may be generated and linked to a particular individual, those cases are given the highest priority. Generally, Walsh assigns the cases on a rotating basis to the senior criminalists and criminalists in the various sections.<sup>18</sup> If Walsh determines that the physical evidence in a specific case requires specialized testing and if a particular staff member possesses a proficiency or has specialty training and expertise in that testing area, she will assign the case on that basis. For example, certain criminalists in the criminalistics section are proficient in footwear comparison and toolmark examinations, and criminalists in the trace section are proficient in areas like paint testing, which is critical in hit and run automobile accidents. Sexual assault cases are automatically directed to the serology section and the criminalists in that section divide the cases themselves on a rotating basis. The criminalists in the serology laboratory also perform general criminalist work including footwear comparisons.

18. Hayes explained that the crime laboratory is small in size compared to other forensic laboratories. Therefore, although the Crime Unit is divided into four sec-

tions, all the staff are generalists, with specialized training in certain areas like DNA analysis and trace evidence where paint, hair, and fibers are examined.

All Crime Unit staff, including the director, senior criminalists, criminalists, forensic technologists, and the forensic laboratory technician, but not the supervising forensic technologist or the forensic evidence technician,<sup>19</sup> report to crime scenes where they are briefed by the detectives assigned to the scene about the crime and the physical evidence that should be collected. These same Crime Unit staff members also participate in the search for evidence during the execution of a search warrant. All Crime Unit staff who report to a crime scene perform the same duties and functions at that crime scene, regardless of title or position. Under the general direction of the detective(s) in charge, the Crime Unit staff take notes, make sketches, take measurements, collect physical evidence like blood, hair, clothing, and weapons for testing back at the crime laboratory, and otherwise help recover evidence from the crime scene.

Generally, two members of the Crime Unit respond to crime scenes in a BPD vehicle marked Boston Police Crime Laboratory. This vehicle is equipped with a BPD radio, which the Crime Unit staff is trained to use. When at the crime scene, they wear a BPD-issued raid jacket, the same jacket worn by the detectives and other police officers. While at the crime scenes, the Crime Unit staff may encounter suspects who have returned to the crime scene and are then detained and removed from the scene by the sworn police officers. Some crime scenes are inherently dangerous, like collecting evidence on subway tracks with a live third rail. The Crime Unit staff are not issued firearms or any other weapon, such as mace, while they are processing a crime scene. On occasion, the BPD has offered psychological services to Crime Unit staff that have processed and collected physical evidence from an emotionally-charged crime scene. Other analysts may also be at the crime scene, like senior criminalists and/or criminalists from the Print Unit, and detectives from the ballistic unit. Occasionally, Crime Unit staff has collected evidence from a suspect after they have been detained.

Crime Unit employees staff the laboratory from 8:00 a.m. to 5:00 p.m. on weekdays. The employees who are trained and qualified to respond to crime scenes on their own are on-call twenty-four hours a day to perform these duties. Using a list of qualified Crime Unit employees, the operations division of the BPD contacts the Crime Unit employee next on this list and notifies them of the crime scene and the identity of the detective-in-charge. The Crime Unit employee then speaks directly with the detective-in-charge to obtain information about the crime scene that will inform his/her decision about the number of Crime Unit employees needed at the scene and to ensure that the requisite supplies and equipment are brought to the scene.

#### *Crime Unit - Quality Control and Quality Assurance*

A fully accredited ASCAD LAB is required to designate an employee as the laboratory's quality manager. In the BPD, the supervising forensic technologist, Maureen Yamartino (Yamartino) is the Crime Unit's quality manager. The supervising forensic tech-

nologist possesses and is required to possess at hire, at minimum, a bachelor's degree with a major in criminalistics, biology, chemistry, biochemistry or related field. Yamartino reports directly to Hayes. In light of her duties as the designated quality manager, Yamartino does not report to crime scenes, nor does she do any casework. Further, Yamartino does not participate in the job performance evaluation process for the Crime Unit employees.

Yamartino administers the laboratory's quality system, consistent with the criteria and standards contained in the Crime Unit's Quality Manual (Manual). The Manual contains the annual audit policy and procedures for evidence receipt, the criteria for conducting audits, the procedures for technical and administrative case review, and the laboratory's administrative procedures. Yamartino conducts the annual audit of each of the Crime Unit's four sections, using a check list to ensure that all aspects of the quality system are followed. Yamartino also oversees each analyst's proficiency testing in their respective specialties and ensures that all the laboratory equipment is maintained and the instruments calibrated to preserve the integrity and quality of the laboratory's work product. The Manual also addresses employee training and professional development, which is required to maintain accreditation. The quality manager maintains the professional development records.

Corrective action is a component of a quality system and is a term of art used in forensic laboratories to ensure work quality. A corrective action plan is required to be in place to attain and maintain accreditation. The Manual defines corrective action, in part, as follows:

It is the policy of the Boston Police Crime Laboratory Unit that corrective actions will be implemented to remediate and prevent recurrence of deficiencies that pertain to the quality of work performed within the Unit. Corrective action should be evaluated in a timely fashion to minimize the impact of the deficiency. ...

Yamartino has corrective action authority over all aspects of the laboratory, including whether an analyst should no longer test the physical evidence in a case, until the requisite correction has been instituted. Hayes also has this authority, and any laboratory employee, regardless of rank or title, may bring information that may require corrective action to Yamartino's attention or to Hayes directly. Corrective actions could result from a technical problem with the equipment, an issue with a proficiency test, or a problem with a staff member's analytical capabilities. The quality manager must be included in any corrective action, including the initiation of the action, the documentation of the corrective action, and the subsequent steps taken to correct any deficiency. The documentation of corrective actions is placed in the quality control files of the laboratory. Although a corrective action is not, standing alone, a form of discipline, depending on the nature of the action required, the documentation could also be placed in an employee's personnel file.

Quality control is also checked on an ongoing basis by requiring two signatures on each case report, with senior criminalists re-

19. The current forensic laboratory technician is newly-hired and has not completed the requisite training to process a crime scene on her own. The prior incum-

bent of this position, who also had a bachelor's degree, did report to crime scenes by herself.



viewing criminalists' work and criminalists reviewing senior criminalists' work in each section and between sections. For example, in addition to proficiencies in serology, the senior criminalist in that section also maintains a proficiency in DNA analysis, footwear, and gunshot residue testing for distance determination and courtroom testimony. Therefore, she has reviewed the casework of other senior criminalists and criminalists in these areas, which are outside the serology section. On occasion, she has reviewed Hayes's work in DNA analysis.

*Forensic Laboratory Technician - Crime Unit*

The forensic laboratory technician is part of the staff of the criminalistics section of the crime laboratory. He/she performs some, but not all, of the same duties as the senior criminalists and criminalists. For example, with proper training, the laboratory technician will open sexual assault kits and test for the identification of semen. She/he will also test bloodstains to identify the presence of human blood, and describe other physical evidence like weapons and clothing. Unlike the senior criminalists and criminalists, however, the forensic laboratory technician does not prepare reports based on the analysis of the physical evidence and testify in court about the results. The forensic laboratory technician may be called to testify in court about the notes she/he has taken about a crime scene.

*Forensic Evidence Technician - Crime Unit*

The forensic evidence technician receives and records all physical evidence received by the crime lab, determines the appropriate storage of the evidence to preserve its integrity, and decides whether the evidence should be brought immediately to the attention of the crime laboratory staff for testing.<sup>20</sup> For example, if unknown substances or corrosive materials are brought in for testing, the evidence technician determines whether they are properly stored and whether the crime laboratory could accept the evidence. Further, the evidence technician checks the evidence to determine if it is dangerous, like a weapon, knife, or syringe, and next decides the appropriate packaging, storage, and handling of the item. The forensic evidence technician may be called to testify in court.

If a detective brings the evidence to the crime laboratory, the evidence technician may discuss the types of analysis suitable for the evidence with that detective. For example, if a detective brings in physical evidence from a suspected arson for testing to determine the type of accelerant, the evidence technician would not accept that physical evidence because the Crime Unit does not perform that specific analysis. He/she would so inform the detective and direct him/her to the appropriate testing facility.

In addition, the forensic evidence technician enters appropriate data into the laboratory's database, types laboratory reports and correspondence, researches old cases, maintains evidence records, and answers the crime laboratory's telephone. The forensic evidence technician does not report to crime scenes or perform any scientific analysis of physical evidence.

*BPD's Forensic Group - Print Unit*

Jennifer Hannaford (Hannaford) has been the Director of the Print Unit since November of 2005. Between November of 2005 and January of 2006, Hannaford established protocols for the unit's work, including written operational procedures and standards consistent with the Scientific Working Group of Friction Ridge Analysis Science and Technology's (SWGFAST) guidelines and recommendations, the discipline's standard. In January of 2006, the civilian Print Unit began processing latent print evidence, replacing a private company that had been processing the evidence during the temporary closure of the BPD's Print Unit.<sup>21</sup>

Hannaford is not included in any bargaining unit for the purposes of collective bargaining. Hannaford reports directly to Dowd. In addition to Hannaford, the Print Unit is staffed with two senior criminalists and four criminalists. One of the four criminalists performs case intake duties for the Print Unit that are substantially similar to the duties performed by the forensic evidence technician for the Crime Unit. In addition, this criminalist does not perform print analysis or respond to crime scenes.

At minimum, the senior criminalists and criminalists in the Print Unit are required to possess at hire a bachelor's degree in forensic science, forensic identification, physical science, criminal justice or a related field. They perform the following duties:

- Examine submitted items of evidence for the presence or absence of latent impressions using a variety of chemical and non-chemical techniques.
- Electronic capture and documentation of latent prints to include digital enhancement techniques.
- Prepare reports and maintain records of all work performed.
- Provide witness testimony in court.

Although only Hannaford and the senior criminalists currently perform fingerprint comparison, the criminalists will also perform this work as soon as they acquire the requisite training and experience. The Print Unit senior criminalists and criminalists respond to crime scenes, although currently not all the staff is sufficiently trained to recognize, collect, and preserve the evidence, with some criminalists more highly trained and experienced in crime scene response work than the senior criminalists.

The senior criminalists review the criminalists' reports and, when all the criminalists are fully trained, the criminalists will review the senior criminalists' reports. This peer review process is an aspect of the quality control and assurance program in an accredited laboratory, as well proficiency testing, which measures the quality of the work that is performed in the Print Unit. The Print Unit has proficiency testing protocols and testing is scheduled to start in October of 2006. Like the Crime Unit, there is a quality control and assurance plan in place that includes the initiation and documentation of a corrective action.

20. The current forensic evidence technician has worked in the crime laboratory for over twenty-five years.

21. Prior to in or about 2004, the Print Unit was staffed with sworn police officers.



Generally, Hannaford assigns the cases to the criminalists, but if a detective or an assistant district attorney requests that the Print Unit immediately process a case, an available senior criminalist or criminalist will take on the work. Since the Print Unit is relatively new, there is no written evaluation procedure in place. Without committing to any evaluative format, Hannaford explained that, given the diversity of her staff with respect to training and experience, with some criminalists more experienced than senior criminalists in certain areas, like handling firearms, a criminalist could as likely be in a position to evaluate a senior criminalist in a certain area, as a senior criminalist evaluating a criminalist in another area. Senior criminalists do not have the authority to suspend, lay-off, or discipline a criminalist. Hannaford has not designated any one staff member to step into her place when she is not in the Print Unit. Rather, Hannaford has informed the staff that each one is responsible for maintaining the day-to-day operations of the unit. As necessary, in her absence, Hannaford has given instructions to both the senior criminalists and the criminalists to complete certain work, and these assignments are directed by the nature of the work and the designee's expertise in that area.

The Print Unit employees work between the hours of 8:00 a.m. to 5:00 p.m. on weekdays. All requests for a member of the Print Unit to respond to a crime scene go directly to Hannaford, who assesses the need for the Print Unit to respond, the work to be done at that crime scene, and who will be assigned. In making this assessment, Hannaford may talk with the personnel in the Crime Unit and the crime scene response unit.

#### *SEIU and the Forensic Group Civilian Employees*

SEIU has processed two compensation grade appeals for the Crime Unit staff. One resulted in a promotion for Hayes effective November 5, 1993, and the other resulted in an upgrade for the forensic evidence technician in 1994. SEIU also resolved a residency issue regarding a senior criminalist that could have resulted in her termination, absent resolution. In 1999, shortly after he started working in the Crime Unit, SEIU designated Kevin Kosiorek (Kosiorek)<sup>22</sup> as an alternate on its bargaining team for the Clerks & Techs agreement. Kosiorek attended one bargaining session as an alternate.

In May of 2005, Deborah Sullivan<sup>23</sup> (Sullivan), SEIU's Director of Field Services, and SEIU's BPD steward, who is a criminalist in the Print Unit and serves as the steward for all BPD employees represented by SEIU in the clerical-technical bargaining unit, discussed with Dowd and the BPD's Deputy Director for Labor Relations the upcoming civilianization of the Print Unit. The topics addressed during this meeting included whether the positions would be included in SEIU's clerical-technical bargaining unit and the impacts of the creation of a crime response team on the bargaining unit. Subsequently, in August of 2005, Dowd and the

BPD's Director of Labor Relations met with Sullivan, SEIU's BPD steward and two criminalists, Kosiorek and Amy Brodeur (Brodeur), who work in the Crime Unit. During this August of 2005 meeting, the participants discussed the impact of the creation of a uniformed crime scene unit on the civilian employees in the forensic group. The meeting followed a letter to Dowd signed by Kosiorek and Brodeur detailing the concerns the Crime Unit had regarding this issue.<sup>24</sup> Prior to sending the letter, the criminalists had raised the issue with SEIU's BPD steward. The steward relayed this information to Sullivan, who requested a meeting with Dowd to address this issue. Immediately after this meeting, Kosiorek talked with Sullivan about a change in the statutory retirement group for Crime Unit personnel, which would impact their retirement benefits. Sullivan told Kosiorek that the SEIU's legislative staff was looking into this issue, since the change required legislative action. After this meeting, Sullivan relayed Kosiorek's concerns to SEIU's legislative director.

In March of 2006, at the time the petitioned-for employees were considering changing the identity of their exclusive representative, some of the Crime Unit and Print Unit employees met with Sullivan and SEIU's BPD steward, and they discussed contract proposals and issues related to the health and safety of the employees, such as whether the employees should have firearms and bullet-proof vests when responding to crime scenes, the safety equipment or training for dealing with biohazards and toxic substances, and whether the employees should have the same injured-on-duty benefits that police officers have. During the meeting, the participants also discussed SEIU's bargaining strategy. Sullivan stated that, although in the past SEIU had held up a contract settlement pending the resolution of a single issue that directly impacted one employee, in the future SEIU would not take that approach. Following this statement, Kosiorek asked: why then would SEIU hold up the settlement for the twenty employees in the Crime Unit and Print Unit until the contract addressed their specific issues, not in common with any other employees in the unit. In response, Sullivan stated that she would take their considerations very seriously, that SEIU would include a proposal that the issues specific to the Crime and Print Units be negotiated by the parties at a side table, separate from the main negotiations, and that SEIU would hold up an agreement with the City until the issues were addressed. Notwithstanding this statement, Kosiorek did not believe that SEIU would hold up a final agreement to address the Crime Unit and Print Unit employees' concerns.

#### *Opinion*

When making determinations regarding appropriate bargaining units, Section 3 of the Law gives professional employees the right to determine whether they wish to be included in a bargaining unit

22. Kosiorek has worked in the Crime Unit since 1998, starting first as an intern, then hired in 1999 as a forensic technologist. The City promoted Kosiorek to the position of criminalist in June of 2003.

23. Sullivan has been employed by SEIU or its predecessor, Local 285, Service Employees International Union since February of 2003 when she started as a field

representative. In June of 2006, Sullivan was promoted to the position of SEIU's Director of Field Services.

24. The Crime Unit personnel did not want to be excluded from processing the crime scenes, a function that civilian staff had performed with uniformed police officers for about thirty years.

containing non-professional employees. *City of Somerville*, 27 MLC 62, 66 (2000). Section 3 provides in relevant part that:

The commission shall prescribe rules and regulations and establish procedures for the determination of appropriate bargaining units which shall be consistent with the purposes of providing for stable and continuing labor relations, giving due regard to such criteria as community of interest, efficiency of operations and effective dealings and to safeguarding the rights of employees to effective representation. No unit shall include both professional and nonprofessional employees unless a majority of such professional employees votes for inclusion in such unit.

The Board has implemented the legislative directive in Section 3 of the Law by either creating separate, appropriate bargaining units of professional employees or providing professional employees with a self-determination election, referred to as the *Globe* ballot, where the appropriate bargaining unit may be a mixed unit of professional and nonprofessional employees. See, e.g., *Boston Water and Sewer Commission*, 7 MLC 1439, 1448 (1980). Further, when a petition raises a question of the majority status of an exclusive representative of a unit that includes both professional and non-professional employees, if the existing mixed unit remains an appropriate unit, the Board has directed a self-determination election for the professional employees to allow them to exercise their right to organize into a separate unit. See, e.g., *City of Lowell*, 34 MLC 155 (2008); see also *Westinghouse Electric Corp.* 116 NLRB 1545, 1547 (1956) (requirements of Section 9(b)(1) of the Act apply even though professionals had earlier decided by majority vote to be included in a unit with nonprofessionals).

In this case, the parties have stipulated that the incumbents of the following positions are professional employees within the meaning of Section 1 of the Law: senior criminalist, criminalist, supervising forensic technologist, and forensic technologist. We adopt that stipulation since it comports with the facts and it does not conflict with the Law or established Board policy. See *North Attleborough Electric Department*, 32 MLC 66, 71 (2005). The parties have also stipulated that: 1) the employees sought by this petition are the only professional employees within the meaning of Section 1 of the Law whose terms and conditions of employment are contained in the Clerks & Techs Agreement; and 2) at no time did the professional employees within the meaning of Section 1 of the Law who now hold or ever held a professional position in the petitioned-for bargaining unit have an opportunity pursuant to Section 3 of the Law to vote in an election to determine whether a majority of such professional employees wish to be included in a bargaining unit that includes nonprofessional employees.

The BPDBS argues that its petition is the appropriate, timely-filed vehicle to provide the petitioned-for group of professional employees with their statutory right to decide, for the first time, whether they desire to be included in a unit with nonprofessional employees. SEIU argues, on the other hand, that it is immaterial whether the incumbents ever had an opportunity by majority vote to determine their unit structure. In support of this argument, SEIU contends that: 1) the incumbents are not the only professional employees in the bargaining unit; and 2) certain of the petitioned-for employees are not professional employees.

In essence, what the Board is presented with here is a request for a simultaneous *Globe* ballot and severance election. See *City of Boston*, 9 MLC 1853, 1855 (H.O.1983) (treating petition seeking to sever detective superior officers because they are professionals from existing larger, mixed unit as a request for a “simultaneous *Globe* and severance election”). Severance petitions inherently raise questions concerning representation, *City of Quincy*, 10 MLC 1027, 1031 (1983), which, by their very nature, require the Board to inquire into the appropriateness of the existing and petitioned-for bargaining units. *MBTA Starters and Inspectors Association*, 6 MLC 1814, 1815 (1980). The Board ordinarily treats severance as “an extraordinary remedy since by definition it upsets an existing status quo and the consequent labor stability flowing from the prior bargaining history.” *City of Everett*, 3 MLC 1372.1376 (1977). As a result, before granting a severance petition, “[p]etitioners must demonstrate that the petitioned for employees constitute a functionally distinct appropriate unit with special interests sufficiently distinguishable from those of other unit employees, and that special negotiating concerns resulting from those differences have caused or are likely to cause conflicts and divisions within the bargaining unit.” *City of Boston*, 25 MLC 105, 119 (1999) (quoting *Northeast Regional Metropolitan Regional Vocational School District*, 7 MLC 1743, 1744 (1981)). The Board has dismissed numerous severance petitions based on the petitioner’s failure to meet either one or both criteria. E.g., *Boston School Committee*, 25 MLC 17 (1998); *City of Springfield*, 19 MLC 1533 (1992); *Town of Dedham*, 4 MLC 1720 (1977).

Because this petition involves a request for a simultaneous *Globe* and severance election, it squarely raises a question concerning representation in circumstances where the professional employees in the petitioned-for unit have never before exercised their Section 3 rights. To decide this case, we must therefore balance the Board’s general disfavor of severance petitions against Section 3’s mandate that, in determining appropriate bargaining units, the Board is precluded from including professional employees with non-professional employees in a single unit unless a majority of professional employees have had the opportunity to vote to be included in the mixed-unit. In weighing these considerations, we recognize that allowing a self-determination vote under these circumstances may result in fragmentation of an existing and long-standing bargaining unit. This is, of course, a result the stringent two-part severance standard is designed to prevent. However, it is reasonable to interpret the statutory grant of a separate vote among professional employees as a legislative determination that they share a particularly strong community of interest, which, in the end, furthers stable and continuing labor relations, even if it may, at times, result in some fragmentation of an existing bargaining unit. See *Town of Braintree*, 5 MLC 1133, 1135-36 (1978) (adopting National Labor Relation Board’s willingness to more “rapidly alter units which were created pursuant to consent agreements or contracts,” and to make changes to bargaining units to satisfy statutory mandates).

Accordingly, we conclude that where a petitioner seeks to represent professional employees who are in a mixed unit of professionals and non-professionals and who have not previously had the opportunity to vote as to their inclusion in that mixed unit, Section 3

confers upon all employees in the larger unit that meet the statutory definition of professional employees the right to a self-determination election to determine whether they wish to remain in the mixed unit or be represented in a stand-alone unit of professionals. Such an election may proceed without further investigation or additional findings on bargaining unit conflict or other aspects of the community of interest standard.

This conclusion is informed by the Board's already-established policy that rejects the typical two-part severance analysis in cases involving petitions seeking to sever law enforcement supervisors from a unit containing employees they supervise. In such cases, if the Board finds that the employees possess significant supervisory authority, it will allow their severance in a Board proceeding that raises a question concerning representation without any further investigation or findings on bargaining unit conflict or other aspects of community of interest. *See, e.g., Town of Greenfield*, 5 MLC 1036, 1041 (1978). Here, stronger grounds exist to carve out a similar exception for professional employees, since our policy decision is rooted in Section 3's express statutory command.

Our holding is also in accord with analogous federal precedent. Interpreting Section 9(b)(1) of the National Labor Relations Act (Act),<sup>25</sup> which contains language similar to Section 3 of the Law, the NLRB has carved out an exception to its general requirement that the unit in decertification petitions must be coextensive with the existing unit. *See, e.g., Campbell Soup Co.*, 111 NLRB 234 (1955). In *Utah Power & Light*, 258 NLRB 1059, 1061 (1981), the NLRB noted that in enacting Section 9(b)(1), Congress clearly recognized that professional employees often have a separate community of interest from other employees. In that case, the professional engineers filed a timely decertification petition seeking to represent a unit of professional engineers who comprised all of the professional employees in the existing, mixed unit. Even though the NLRB continued to require that the unit for decertification be coextensive with the existing unit, citing the policies inherent in Section 9(b)(1), it made an exception for what it deemed the "unique situation" of the professional employees who never before had the opportunity to vote in a self-determination election. *Id.* In so holding, it distinguished the circumstances addressed in *Westinghouse Electric Corp.*, 115 NLRB 530 (1956), where the NLRB rejected the professionals' request to decertify from a

mixed unit because they were placed in the mixed unit pursuant to their vote in an earlier self-determination election. *See also Corporacion de Servicios Legales de Puerto Rico*, 289 NLRB 612 (1988) (affirming *Utah Power & Light* exception, but dismissing on other grounds).

Division of Labor Relations hearing officers have also reached similar conclusions, as have other state labor relations agencies. *City of Chicopee*, 10 MLC 1271 (H.O. 1983) (severing unit of nurses who had never been afforded the opportunity to vote on their inclusion in a recognized, mixed unit of professional employees and nonprofessional employees based on the policies of Section 3 of the Law); *City of Boston*, 9 MLC 1853 (H.O. 1983) (ordering simultaneous *Globe* and severance elections for unit of detective superior officers upon whom statutory professional status had recently been conferred); *City of Marshfield*, 252 Wis. 2d 656 (2002) (affirming decision of Wisconsin Employment Relations Commission that granted craft employees who were members of a mixed municipal bargaining unit the right to an election to determine whether they wished to establish a separate bargaining unit comprised exclusively of craft workers).

The SEIU nevertheless argues that *City of Somerville*, 27 MLC 62 (2000) dictates a contrary outcome. In that case, the Board dismissed a petition filed by a group of nurses seeking severance from a bargaining unit that also included non-professional employees.<sup>26</sup> Applying the traditional two-prong severance analysis, the Board held that although the nurses constituted a functionally distinct group, there was no evidence that the nurses' special negotiating concerns had caused or were likely to cause divisions within the bargaining unit. *Id.* at 65-66. The Board separately addressed and rejected the nurses' argument, raised for the first time in its post-hearing brief, that they should be severed from the unit because they were professional employees who did not have an opportunity to vote on whether to be included in a mixed unit of professionals and nonprofessionals. *Id.* at 65, n.8, 66.<sup>27</sup> In reaching this conclusion, however, the Board noted that the issue of whether the nurses should be severed from the existing unit and placed in their own separate bargaining unit and the issue of whether the nurses are professional employees entitled to vote on whether to be included in a unit with nonprofessional employees were two different issues.<sup>28</sup> Because the Board applied the traditional sever-

25. Section 9(b)(1) of the Act provides:

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; ...

26. The facts in *City of Somerville* state that the bargaining unit that included the nurses and nonprofessional employees also included "other employees who are required as a condition of their employment to hold college degrees. These positions include librarians and civil engineers." 27 MLC at 64.

27. The petitioners did not explicitly seek a self-determination election.

28. The following is an excerpt from the *Somerville* decision:

The issue of whether the nurses should be severed from Unit B and whether the nurses are professional employees entitled to vote on whether to be included in a unit with non-professional employees are two different issues. Even if we were to determine that the nurses should have an opportunity to vote as to whether they wish to be included in a bargaining unit containing non-professionals, we do not find this to be a valid reason to order that the nurses should be severed from the existing bargaining unit they have been in for many years. Section 3 of the Law gives professional employees the right to determine whether or not they wish to be included in a bargaining unit containing non-professional employees in the context of the Commission's determination of appropriate bargaining units. It does not contemplate the issue of placing professional employees in a recognized bargaining unit merely because they are professional employees in a recognized bargaining unit containing non-professional employees. For these reasons, we decline to sever the nurses from the existing bargaining unit merely because they are professional employees, and we direct that the petition be dismissed.

27 MLC at 66.

ance analysis to the nurse's petition, it never reached the issue of whether the petitioned-for employees were professional employees who should have the opportunity to vote as to whether they wished to be included in a bargaining unit with non-professional employees. This issue is now being squarely presented by the BPBDS's petition.

In addition to this procedural distinction, *Somerville* is factually distinguishable because the record does not establish that the nurses in that case were the only professionals in the unit. Rather, the record indicates that that bargaining unit was comprised of 250-255 employees in "various classifications" from departments that included, *inter alia*, the library, board of health, police and fire departments. The unit included "other employees who were required as a condition of their employment to hold college degrees." *Id.* at 63. This included librarians and civil engineers. On the facts, therefore, *Somerville* does not govern. Here, we find that a *Globe* election is proper in the context of a severance petition because, as discussed below, the record shows that the petitioned-for unit includes *all* the professionals in the current bargaining unit and the petitioner explicitly seeks a self-determination election among professionals who have not previously exercised that right.<sup>29</sup> Under those circumstances, we hold that, in the context of a Board proceeding that raises a question concerning representation, Section 3 confers upon the professionals the right to vote on their continued inclusion in a mixed unit of professionals and non-professionals, regardless of whether they meet the traditional severance standard.

#### Professional Status

Having determined that the statutory professionals in the petitioned-for unit are entitled to a *Globe* ballot, we must next address the parties' arguments regarding the composition of the petitioned-for unit. The parties have stipulated that the senior criminalist, criminalist, supervising forensic technologist and forensic technologist are professional employees within the meaning of Section 1 of the Law, but disagree over the professional status of two titles: the forensic laboratory technician and the forensic evidence technician.

Section 1 of the Law defines professional employee as:

Any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, (ii) involving the consistent exercise of discretion and judgment in its performance, (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes.

All four statutory criteria must be met to satisfy the definition. *Boston School Committee*, 25 MLC 160, 161 (1999) (citing *Commonwealth of Massachusetts*, 10 MLC 1162 (1983)). To be a professional employee within the meaning of the Law, the employee must perform work that requires at least three years of higher education leading to a specialized degree, and in most instances, certification, registration, or licensing. *Boston Water and Sewer Commission*, 7 MLC at 1448. In this case, the facts establish that the educational requirements to perform the work of the two disputed positions do not satisfy this requirement. Although the forensic laboratory technician possesses a bachelor's degree, it is undisputed that the education/experience required to perform this work is an associate's degree or higher with a major in a scientific discipline. In addition, the entry requirements for the forensic laboratory technician position permit prior forensic laboratory experience to substitute for the associate's degree requirement. The facts also demonstrate that the forensic evidence technician does not possess, nor does the position require, a degree beyond high school.

The BPBDS next argues that because all the petitioned-for employees are members of a detective bureau who are primarily engaged in investigative work, they are all professional employees within the meaning of Section 1 of the Law as amended by Chapter 679 of the Acts of 1981. We disagree. Chapter 679 of the Acts of 1981, An Act Relative to the Collective Bargaining Status of Police Detectives in Certain Cities and Towns, added the following language to the definition of professional employee in Section 1 of the Law:

Professional employee shall include a detective, member of a detective bureau or police officer who is primarily engaged in investigative work in any city or town police department which employs more than four hundred people.

A statute must be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Commonwealth v. Connor C., a juvenile*, 432 Mass. 635, 640 (2000) (internal citations omitted). Applying this tenet of statutory construction, we are convinced that the legislative intent of this amendment, evident from its wording and considered in the context of its title, was to limit its application to sworn, uniformed police detectives and police officers who are primarily engaged in investigative work and that it does not include civilian employees.

We next address SEIU's argument that the senior criminalists, the criminalists, the supervising forensic technologist and the forensic technologist are not the only professional employees in the existing bargaining unit because the unit also has included other profes-

29. The Board has decided that a public employer lacks standing in a unit clarification petition to seek the exclusion of professional employees from an existing bargaining unit because they did not have an opportunity to vote whether they desired to be included in a unit that also includes nonprofessional employees. *Town of Greenfield*, 32 MLC 133 (2006). In reaching this conclusion, the Board reasoned that the statutory right of professionals to decide this issue inures to the benefit of

the professional employees, not the public employer or the union that seeks to represent them. *Id.* at 151 (citing *Town of Tisbury*, 30 MLC 77, 83 (2003)). The Board has also ruled that a public employer who freely consented to an election procedure that did not accord the professional employees their rights under Section 3 of the Law was precluded from raising their interests in the context of objections to the conduct of an election. *City of Boston*, 19 MLC 1501 (1992).

sional employees in the City's department of neighborhood development since 1992, as evidenced by the Division's own certification of representatives. Notwithstanding this certification, however, an examination of the bargaining history at all times subsequent to 1992 demonstrates that the City and the SEIU have negotiated two separate, distinct collective bargaining agreements, commonly referred to as the Clerks & Techs Agreement and the DND Agreement, for these two groups of employees. Furthermore, the most recent bargaining history establishes that the City and the SEIU first negotiate separately over the terms and conditions in common for the City employees represented by SEIU, not only covered by these two agreements, but also for two other SEIU units and that there are four separate SEIU bargaining teams, one for each contract. Although these four teams meld into one team for negotiations with the City over the terms in common for the employees covered by all four agreements, the facts establish that the four contracts are each subject to separate ratification by the unit members covered by each contract. For instance, if the employees covered by the DND agreement do not ratify their respective contract, that contract is not signed. Based on this evidence, we find that, for the purposes of directing a self-determination election for the professional employees at issue here, it is appropriate to limit the unit to the employees covered by the contractually-defined Clerks & Techs Agreement. The fact that the Clerks & Techs Agreement references the separate DND Agreement in a single provision does not require a different outcome.

Finally, SEIU argues that a separate bargaining unit consisting of the petitioned-for group of employees is inappropriate for certification because it includes supervisory employees in the same unit as the employees they supervise. By this decision, we are providing the professional employees with a statutory right set forth in Section 3 of the Law, which none of these professional employees has ever before exercised. Under the unique circumstances presented in this case, we decline to address whether there are any professional employees in the voting group who exercise significant supervisory authority over other employees in the voting group. Although the Board ordinarily places supervisors in a bargaining unit separate from the employees they supervise, it is a policy determination, not an express statutory command. Furthermore, even assuming that certain of the professional employees are supervisory employees, a determination on this issue would in no way cause us to reexamine our holding that these professional employees have a right to elect whether they desire to remain in the existing unit. On the other hand, should the professional employees decide by majority vote not to be included in a bargaining unit with non-professional employees, further sub-dividing the newly-created unit would significantly impair the collective strength of the employees. See *Town of Seekonk*, 30 MLC 121, 125-126 (2004), (citing *Chicopee School Committee*, 1 MLC 1195, 1197 (1974))(further citations omitted).

#### Conclusion and Direction of Election

Based on the record and for the reasons stated above, we conclude that a question has arisen concerning the bargaining unit placement and the representation of certain professional employees employed by the City of Boston. These professionals have been in-

cluded in a bargaining unit that also includes non-professional employees without ever having an opportunity pursuant to Section 3 of the Law to vote in an election to determine whether a majority of such professional employees wish to be included in such a unit.

We find that the following professional employees within the meaning of Section 1 of the Law constitute the appropriate voting group:

All full-time and regular part-time professional employees employed by the City of Boston in the following positions: senior criminalist, criminalist, supervising forensic technologist, and forensic technologist, excluding all managerial, confidential, and casual employees and all other employees of the City of Boston.

IT IS HEREBY DIRECTED that an election shall be held for the purposes of determining: 1) whether a majority of the professional employees in the above-described voting group desire to be included in an overall bargaining unit consisting of both professional employees and nonprofessional employees that is represented by the Service Employees International Union, Local 888 for the purposes of collective bargaining; and 2) if a majority vote against such inclusion, whether a majority of the voting group wish to be represented for the purposes of collective bargaining by the Service Employees International Union, Local 888, or by the Boston Police Detectives Benevolent Society, or by no employee organization.

The eligible voters shall include all the employees in the voting group whose names appear on the City of Boston's payroll for the payroll period for the week ending the Saturday preceding the date of this decision and who have not since quit or been discharged for cause. This list must be either electronic (e.g. Microsoft Access or Excel) or in the form of mailing labels.

All eligible voters shall receive a ballot that asks the following two questions:

1. Do you desire to be included in an overall bargaining unit consisting of both professional employees and non-professional employees that is represented by Service Employees International Union, Local 888?
2. Do you desire to be represented for the purpose of collective bargaining by the Service Employees International Union, Local 888, or by the Boston Police Detectives Benevolent Society, or by no employee organization?

If a majority of the employees in the voting group vote "Yes" to question no. 1, above, then they will continue to be represented by Service Employees International Union, Local 888 as part of the existing contractual unit that includes both professional and non-professional employees and the results of question no. 2 will not be counted.

If, on the other hand, a majority of the employees in the voting group vote "No" to question no 1, above, then, a separate bargaining unit will be established consisting of:

All full-time and regular part-time professional employees employed by the City of Boston in the following positions: senior criminalist, criminalist, supervising forensic technologist, and fo-

rensic technologist, excluding all managerial, confidential, and casual employees and all other employees of the City of Boston

The votes on question no. 2 will be counted to determine whether the eligible voters in the voting group desire to be represented for the purpose of collective bargaining in the above-described unit by the Service Employees International Union, Local 888, or by the Boston Police Detectives Benevolent Society, or by no employee organization.

To ensure that all eligible voters shall have the opportunity to be informed of the issues and the statutory right to vote, all parties to this election shall have access to a list of voters and their addresses which may be used to communicate with them.

Accordingly, IT IS HEREBY FURTHER DIRECTED that an election eligibility list containing the names and addresses of all eligible voters must be filed by the City of Boston with the Executive Secretary of the Division, Charles F. Hurley Building, 19 Staniford Street, 1<sup>st</sup> Floor, Boston, MA 02114 not later than fourteen days from the date of this decision.

The Executive Secretary shall make the list available to all parties to the election. Failure to submit the list in a timely manner may result in substantial prejudice to the rights of the employees and the parties; therefore, no extension of time for filing the list will be granted except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting aside the election, should proper and timely objections be filed.

SO ORDERED.

\* \* \* \* \*

## In the Matter of CHICOPEE EDUCATION ASSOCIATION

and

## CHICOPEE SCHOOL COMMITTEE

Case No. CAS-08-3735

17.1 confidential employee  
34.91 accretion  
35.2 confidential employees

September 17, 2009

Marjorie F. Wittner, Chair

Elizabeth Neumeier, Board Member

Harris Freeman, Board Member

Melissa M. Shea, Esq.

Representing the Chicopee  
School Committee

Frederick M. Doherty

Representing the Chicopee  
Education Association, MTA

## DECISION<sup>1</sup>

### Introduction

This CAS petition presents the issue of whether the newly-created position of Administrative Secretary to the Director of Career and Technical Education (Administrative Secretary) should be accreted to the secretaries/clerks bargaining unit (Unit D) represented by the Chicopee Education Association (Petitioner or Union) in the Chicopee public schools.

The Petitioner argues that the Administrative Secretary should be accreted to the Secretaries/Clerks unit because: 1) the incumbent in the position shares a community of interest with other positions in Unit D in terms of hours of work and duties; 2) the incumbent in the new position was formerly a Unit D member who worked for the Director for five years and her duties did not significantly change when she was appointed to the new position; and 3) the new position is not confidential, managerial or supervisory.

The School Committee contends that it appropriately placed the Administrative Secretary outside of the bargaining unit because the incumbent handles confidential labor relations matters and supervises employees in Unit D. The School Committee provided an affidavit from the Director of Career and Technical Education in support of these assertions. We dismiss the petition as the evidence presented by the School Committee, which the Union failed to rebut, demonstrates that this position is confidential within the meaning of Section 1 of the Law.

1. Pursuant to 456 CMR 13.02(1) of the former Labor Relations Commission's regulations, this case was designated as one in which the former Labor Relations Commission would issue a decision in the first instance. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the

legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission."