

In the Matter of TOWN OF TISBURY

and

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, COUNCIL 93, AFL-CIO

Case No. CAS-03-3542

33.	<i>Consent Agreements and Stipulations</i>
34.901	<i>timeliness of filing</i>
34.91	<i>accretion</i>
34.93	<i>severance</i>
35.2	<i>confidential</i>
35.6	<i>professionals</i>
35.7	<i>supervisory and managerial employees</i>
91.1	<i>dismissal</i>
91.31	<i>standing to file charge</i>
92.47	<i>motion to dismiss</i>

November 14, 2003

Allan W. Drachman, Chairman

Hugh L. Reilly, Commissioner

Joseph A. Sarno, Jr., Esq.	Representing the Town of Tisbury
Wayne Soini, Esq.	Representing the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO

DECISION¹

Statement of the Case

On January 23, 2003, the Town of Tisbury (Town) filed a petition with the Labor Relations Commission (Commission) seeking to exclude the positions of health agent and assistant health agent/food inspector from a bargaining unit of non-supervisory Town employees for whom the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (Union) is the exclusive collective bargaining representative.

The Town seeks to exclude the health agent's position from the non-supervisory bargaining unit primarily on the grounds that, in or about August 2002, the Town significantly modified the health agent's job duties and responsibilities by including supervisory responsibilities. Further, the Town contends that the health agent is a managerial employee, a representative of the Town and the Board of Health, a department head, an appointed official, and a professional employee within the meaning of Section 1 of the Law, and, therefore, should be removed from the bargaining unit. The Town seeks to exclude the assistant health agent/food inspector's position from the bargaining unit on the grounds that the assistant health agent/food inspector is a confidential employee within the meaning of Section 1 of the Law because he/she works closely

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

with and directly assists the health agent, a managerial employee within the meaning of the Law.

The Union opposes the exclusion of both positions from its bargaining unit. The Union asserts that, notwithstanding the description of the bargaining unit as non-supervisory, certain positions in the existing bargaining unit, like the Children's Librarian/Assistant to the Head Librarian, the Council on Aging Director, and the foreman positions in the Town's Department of Public Works, perform the same or substantially similar supervisory duties that the Town intends to assign to the health agent. Therefore, in the Union's view, even if the Town fully implements the changes in the health agent's job duties by requiring him to perform certain supervisory duties, that assignment does not warrant the removal of the health agent's position from the bargaining unit. Second, the Union contends that the assistant health agent /food inspector is appropriately included in the bargaining unit.

Commission agent Ann T. Moriarty, Esq. investigated the issues raised in the petitions, and on May 23, 2003, the Commission provided all parties with a summary of the information adduced during the investigation. Further, because it did not appear that any material facts were in dispute, the Commission requested the parties to show cause why it should not resolve the unit placement issue based on the summary of information from the investigation. Neither party responded to the Commission's show cause letter. Therefore, it is appropriate for the Commission to decide the issues presented based on the following undisputed facts.

Undisputed Facts²

Original Certification - Case No. MCR-3694, Town of Tisbury

On February 2, 1987, the Town and the Union entered into an Agreement for Consent Election (the Consent Election Agreement) in Case No. MCR-3694, *Town of Tisbury* for the below-described bargaining units:

Unit A: All full-time and regular part-time non-supervisory employees employed in the Town of Tisbury, excluding the executive secretary, the secretary to the executive secretary, uniformed employees of the police and fire departments, all managerial, supervisory, confidential, and casual employees and all other employees

Unit B: All full-time and regular part-time supervisory employees employed by the Town of Tisbury, including the town accountant, treasurer/tax collector, and head librarian, excluding the executive secretary, the secretary to the executive secretary, uniformed employees of the police and fire departments, all managerial, confidential, and casual employees and all other employees

2. The Commission's jurisdiction is uncontested.

3. During the investigation of this unit clarification petition, the Town and the Union agreed that the position of health agent and secretary to the health agent had been in existence since at least 1987 and included in the non-supervisory bargaining unit at the time of the original certification. The Commission's case file in Case No. MCR-3694, *Town of Tisbury* indicates that, at the time the Union filed the petition, it sought the following health department positions:

2 - Driver/Collector (Health Department)

1 - Foreman (Health Department)

At the time the Town and the Union entered into the Consent Election Agreement, the Town's health department included, at minimum, the position of health agent or its predecessor title and a secretary.³ On March 2, 1987, the Commission certified the Union as the exclusive collective bargaining representative of employees in the above-described bargaining units.

Unit B - Supervisory Bargaining Unit - Decertification Petition - Case No. MCR-3974, Town of Tisbury

On January 31, 1990, a decertification petition was filed by and on behalf of the employees in Unit B, the supervisory bargaining unit. On May 24, 1990, the Town and the Union entered into an Agreement for Consent Election in Case No. MCR-3974, *Town of Tisbury* for the below-described supervisory bargaining unit:

All full-time and regular part-time supervisory employees employed by the Town of Tisbury, including the town accountant, treasurer/tax collector, head librarian, water superintendent, harbormaster, and building inspector; excluding the executive secretary, the secretary to the executive secretary, uniformed employees of the police and fire departments, all managerial, confidential, and casual employees and all other employees

On June 26, 1990, the Commission revoked the Union's certification because a majority of the eligible voters did not select the Union as their exclusive collective bargaining representative.

Collective Bargaining Agreement

The Town and the Union are parties to a collective bargaining agreement (the Agreement) effective by its terms from July 1, 2001 to June 30, 2004. The parties signed the Agreement on December 18, 2001. Article I *Recognition*, Section 1 of the agreement reads as follows:

In accordance with the certification of the State Labor Relations Commission issued on March 2, 1987 in Case Number MCR-3694 as modified on June 26, 1990 in Case Number MCR-3974 the Town recognizes the Union as the exclusive bargaining representative with respect to wages, hours and other conditions of employment for the following bargaining units:

Unit A: All full-time and regular part-time non-supervisory employees employed in the Town of Tisbury excluding the Town Administrator, Assistant Town Administrator, Executive Secretary, Secretary to the Executive Secretary, Town Accountant, Treasurer, Tax Collector, Library Director, DPW Director, Water Superintendent, Water Administrator, Harbormaster, Shellfish Constable, Building Inspector, EMT Service Coordinator, uniformed employees of the Police and Fire Departments, all managerial, supervisory, confidential and casual employees, and all other employees.

1 - Driver/Collector/Landfill Attendant (Health Department)

The case file also contains a list of the Town's General Government Positions including the following positions under the Health Department: administrative secretary, sanitarian/sanitarian assistant, foreman, driver/collector, collector/driver, and collector. The case file does not contain any specific information about the health agent's position or its predecessor title that would demonstrate whether the parties discussed if the health agent was a professional employee within the meaning of Section 1 of the Law at that time.

Article V, Grievance-Arbitration, Section one, Step one, in part, provides:

Step 1: The grievance shall be presented in writing to the town administrator to the Board of Selectmen within three (3) working days of when the grievant first knew or reasonably should have known of the incident upon which the grievance is based.

Septage Information Management System

In or about August 2002, the Town adopted a septage information management system that will be administered by the Town's Board of Health. Under this management system, the Town is divided into seven areas, each with different criteria that individual waste water treatment facilities must meet under Title V. As of April 22, 2003, the Town has not yet implemented this management system.

As discussed below, when the Town adopted this system, it also approved changes in the Board of Health's position description for the health agent. Specifically, in or about August 2002, the Town/Board of Health added the following job duties and certification requirements to the health agent's job description:

Title V System Inspector Certification

Soil Site Evaluator Certification

- Coordinates and witnesses septic inspections for the Septage Information Management System.
- Coordinates and/or conducts water sampling and testing programs.

When the Town adopted the septage information management system and increased/changed the health agent's job duties, it also approved the creation of a new position, assistant health agent/food inspector, as recommended by the Board of Health.

Assistant Health Agent/Food Inspector

In August 2002, following Town Meeting consideration in April or May 2002, the Town's Board of Selectmen approved the position description for the position of assistant health agent/food inspector as prepared and approved by the Town's Board of Health.⁴ The Town has not yet filled this newly-created position. The Town and the Union are currently discussing the salary range for this position, and, as of April 22, 2003, these discussions were on-going.

Based on the Town's published, approved position description, the assistant health agent/food inspector will work under the direction and supervision of the Board of Health Commissioners and the health agent performing administrative and inspection functions and will perform the health agent's duties and oversee the health department in the health agent's absence. At hire, the assistant health agent/food inspector must possess a high school degree with two years experience in public health or related field with a valid food manager certification with a passing grade on an exam recognized by the Massachusetts Department of Public Health and approved by the Town's Board of Health. The essential duties and

responsibilities of the assistant health agent/food inspector as listed on the approved position description are:

- Performs public health inspections, including but not limited to restaurants, food handling and processing establishments, pools and spas, hotels, motels and bed & breakfast establishments, catered and special events as required by Mass State Sanitary Code for Food Establishments and local regulation. Documents inspections on the appropriate forms and generates any necessary paperwork. Maintains records pertaining to inspections and reports the results to the Health Agent and Board of Health Commissioners.
- Responds to inquiries from food establishments and the general public. Handles and investigates certain complaints relating to public health.
- Administers and correlates program data for the Septic Information Management System. Generates necessary reports and property owner notifications related to this program.
- Provides clerical and administrative support where necessary.

Health Agent

In August 2002, following Town Meeting consideration in April or May 2002, the Town's Board of Selectmen approved the position description for the position of health agent as prepared and approved by the Town's Board of Health. By letter dated December 11, 2002, the Town's Board of Health informed the health agent that, on December 10, 2002, it had voted to appoint the health agent as "Department Head, as described in the job description approved by the Board of Health and Board of Selectmen this past June, effective immediately." That letter also stated, in part as follows:

Please prepare a report of the steps necessary to implement the septage management plan as well as continuing to fulfill the duties currently required of this department. As part of this report you should include an estimate of any overtime or temporary personnel required to meet the needs of the office and the projected cost to the Town. As Department Head you are now responsible for work assignments for the department and, as such, you may assign additional duties to the current secretary to ensure the obligations of the Health Department are met.

However, the increased duties/changes in the health agent's job, although approved, are not yet fully implemented. The parties are currently discussing an increase in the health agent's salary, and, as of April 22, 2003, these discussions were on-going.

The Town intends that the health agent will be responsible for the direct supervision of both the Board of Health's secretary and the assistant health agent/food inspector when both the assistant health agent/food inspector's position is filled and the septage information management system is implemented. Before these two dependent events occur, however, the health agent does not exercise direct supervisory authority over any Town employees. The Town generally described the health agent's future supervisory duties to include the ability to discipline, to monitor attendance, to assign duties, and, to conduct performance evaluations.

4. The Union did not enter into a stipulation that the position description is a fair and accurate description of the job duties of the newly-created bargaining unit position of assistant health agent/food inspector.

The Town and the Union agree that the newly-approved health agent's job description is a fair and accurate description of the job duties of the health agent that are currently assigned, but not yet fully implemented. The health agent's new job description, in part, provides:

Definition: Performs a wide variety of administrative, technical and inspectional functions and testing procedures addressing compliance with state and local health related laws and regulations; water sampling and testing; and the review of septic systems and plans. All other related work as required.

Supervision: Works under the policy direction of the Board of Health Commissioners.

Supervisory Responsibilities: Responsible for the direct supervision of the Assistant Health Agent/Food Inspector and the Board of Health Secretary.

Essential Duties and Responsibilities:

- Enforces state and local public health laws, rules and regulations; investigates and reports cases of diseases dangerous to public health; confers with Board of Health Commissioners; updates and advises Board of Health Commissioners concerning ongoing projects and activities; makes recommendations to the Board concerning new programs, regulations, or other decisions. Reviews septic system plans.

- Performs varied duties requiring considerable judgment in the interpretation and application of laws and local regulations to frequently changing conditions and problems. Makes frequent contacts with state and local health officials, town officials, operators and managers of establishments handling food products, and the general public.

- Coordinates and witnesses septic inspections for the Septage Information Management System. Coordinates and/or conducts water sampling and testing programs.

- Responds to inquiries, reports and complaints from the general public; explains regulations and enforcement procedures. Considerable effort required to detect and correct errors, which could be costly in terms of inadequate standards of public health and sanitation.

RECOMMENDED MINIMUM QUALIFICATIONS

Education and Experience:⁵

Bachelor's degree in biological sciences, public health or related field; two years as a public health agent, sanitarian, or comparable private sector experience and/or any equivalent combination of education and experience.

Additional Requirements:

Current food handlers certification. Class 3 Massachusetts driver's license required. Title V System Inspector Certification. Soil Site Evaluator Certification.

Knowledge, Ability and Skill: Thorough knowledge of the laws, rules and regulations pertaining to public health, sanitation and approved methods and equipment for handling milk and food. Thorough knowledge of the principles and practices of subsurface disposal system design and installation. Working knowledge of cur-

rent inspection and control procedures. Ability to enforce and interpret regulations firmly, tactfully and impartially. Ability to communicate effectively, orally and in writing. Registration as a state sanitarian strongly preferred. Certification as a health officer preferred.

Other Town Employees In the Union's Non-Supervisory Bargaining Unit

The Union's bargaining unit is a town-wide non-supervisory bargaining unit that includes the following positions arranged by pay grade in ascending order:

Pay Grade	Position
1.	Receptionist
2.	Custodian I
3.	Assistant Landfill Attendant Elder Companion Laborer I
4.	Custodian II Department Secretary Laborer II/CDL Landfill Attendant Library Assistant I Sanitation Worker II/CDL
5.	Activities Director Administrative Secretary Board Secretary Cemetery Assistant Financial Assistant Library Assistant II Traffic Officer Water System Craftsman
6.	Animal Control Officer Water Technician I WSC/Equipment Operator
7.	Equipment Operator/Laborer II/CDL Landscaper Water Technician I/Equipment Operator Water Technician II
8.	Painter
9.	Carpenter Water Technician I/Equipment Operator Water Technician III
10.	Childrens Librarian Reference Librarian Water Technician II/Equipment Operator Water Technician IV
11.	Assistant Treasurer/Collector Electrician Mechanic Water Technician IV/Equipment Operator
12.	Council on Aging Director
13.	Health Agent
14.	General Foreman Water Works Foreman
15.	Assistant Assessor

5. These education and experience requirements are identical to those included in the health agent's position description approved by the Town on January 3, 1993.

As noted above, the Union's bargaining unit currently includes the Children's Librarian/Assistant to the Head Librarian, the Council on Aging Director, and the General Foreman, Department of Public Works who all perform certain supervisory duties. Based on the published Town position descriptions, their respective job duties and responsibilities are summarized below:

- Children's Librarian/Assistant to the Head Librarian - Working independently under the administrative direction of the Head Librarian, the Children's Librarian/Assistant to the Head Librarian: 1) plans, organizes, directs and implements children's programs and activities for the library; 2) provides reference and children's reader advisory services; 2) assists the Head Librarian in managing the library; 3) temporarily replaces the Head Librarian in his/her absence; 4) plans and maintains the children's collection; and, 5) trains and supervises two or fewer part-time employees in the children's area, making recommendations to the Head Librarian concerning personnel actions.

- Council on Aging Director - Working under the policy direction of the Council on Aging, the Council on Aging Director: 1) administers the general operations of the Council on Aging; 2) prepares the budget; 3) trains and supervises the equivalent of three or fewer full-time employees and five volunteers; 4) develops and implements social, educational, recreational, and health programs for senior citizens; and, 5) provides direct counseling to senior citizens.

- General Foreman, Department of Public Works - Working under the direction of the Director of the Department of Public Works, and under the general direction of the Board of Public Works Commissioners, the General Foreman, Department of Public Works directs and manages the operations of the various divisions within the department, including buildings and grounds, streets, refuse and recycling operations and snow removal operations. The incumbent supervises the equivalent of fifteen or fewer full-time employees, including skilled and unskilled persons.

The Town does not intend to fill the General Foreman's position that is currently vacant, but instead fill two working foreman positions: 1) Working Foreman, Buildings and Grounds Division; and, 2) Working Foreman, Sanitation and Roads Division. Based on the published Town position description their respective job duties and responsibilities are summarized below:

- Working Foreman, Buildings and Grounds Division, Department of Public Works - Working under the direction of the Director of the Department of Public Works and the general direction of the Board of Public Works Commissioners, the working foreman directs and manages the operations of the Buildings and Grounds Division in the Department of Public Works. The incumbent supervises the equivalent of four or fewer full-time employees which include skilled and unskilled trades persons.

- Working Foreman, Sanitation and Roads Division, Department of Public Works - Working under the direction of the Director of the Department of Public Works and the general direction of the Board of Public Works Commissioners, the working foreman directs and manages the operations of the Sanitation and Roads Division in the Department of Public Works. The incumbent supervises the equivalent of seven or fewer full-time employees which include skilled and unskilled trades persons.

Discussion

Contract Bar

On April 10, 2003, the Union filed a Motion to Dismiss on the grounds that the Town's unit clarification petition is untimely filed. On April 18, 2003, the Town filed its opposition to the Union's motion. The Town argues that the existing collective bargaining agreement between the parties does not act as a bar to its petition because the Commission's rules permit the filing of a unit clarification petition during the term of an agreement, if the position(s) at issue have been created or the job duties have been substantially changed after the effective date of the agreement. *See*, 456 CMR 14.06(1)(b). Here, the Town states that it created the position of assistant health agent/food inspector and substantially changed the job duties of the health agent in or about August 2002, after the effective date of the parties' agreement. Therefore, the Town argues that its petition is timely filed under the applicable Commission rule.

After reviewing carefully the material and arguments submitted by the parties, the Commission has decided to process the Town's petition.

Commission Rule 14.06(1)(b) provides:

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

The purpose of the contract bar rule is to establish and promote the stability of labor relations and to avoid instability of labor agreements, in part, by ensuring that both labor and management are aware of which positions are included in the bargaining unit covered by their collective bargaining agreement. *Springfield School Committee*, 29 MLC 106, 111 (2002), *citing*, *Massachusetts Water Resources Authority*, 19 MLC 1778, 1779 (1993).

Here, the Town and the Union are parties to a collective bargaining agreement effective by its terms from July 1, 2001 to June 30, 2004 (the Agreement). The parties signed the Agreement on December 18, 2001. Therefore, absent good cause shown, the Commission's contract bar rule requires dismissal of this petition unless the facts establish that: 1) the disputed position is newly-created; or 2) the job duties of the disputed position have changed substantially since the effective date of the collective bargaining agreement. 456 CMR 14.06(1)(b).

It is undisputed that the Town created the assistant health agent/food inspector's position in August 2002, after the parties entered into the Agreement. Further, the facts establish that the parties are discussing the salary range for this new classification. Although the fact that the position is not yet filled may impact the Commission's ability to decide whether this newly-created position should be excluded from the Union's bargaining unit, *see e.g.*, *Upper Cape Cod Regional Vocational Technical School Commit-*

tee, 9 MLC 1503 (1982); *Town of Wellesley*, 2 MLC 1443, 1446 (1976), the petition is timely filed under the Commission's contract bar rule.

It is also undisputed that in August 2002, the Town added the coordination and implementation of the newly-approved septage information system and the supervision of the assistant health agent/food inspector to the health agent's job duties. Concurrent with these changes, the Town also increased the health agent's certification requirements to include a Title V System Inspector Certification and a Soil Site Evaluator Certification. Further, the parties are currently discussing an increase in the health agent's salary commensurate with the increased job duties and licensure requirements. Therefore, the Commission finds that the job duties and responsibilities have changed substantially since the date the parties entered into the Agreement. Accordingly, the Commission has decided to deny the Union's Motion to Dismiss. The purposes of the Commission's contract bar rule are not violated because the Town created the position of the assistant health agent/food inspector and substantially changed the job duties of the health agent after the parties entered into the Agreement.

Health Agent

The Town argues that the health agent is a managerial employee within the meaning of Section 1 of the Law, a representative of the Town and the Board of Health, a department head, an appointed official, a supervisory employee, and a professional employee within the meaning of Section 1 of the Law, and therefore, the health agent must be excluded from the Union's bargaining unit.

Section 1 of the Law defines an employee or public employee as:

Any person in the executive or judicial branch of a government unit employed by a public employer except elected officials, appointed officials, members of any board or commission, representatives of any public employer, including the heads, directors and executive and administrative officers of departments and agencies of any public employer, and other managerial employees or confidential employees ...

The Commission has construed the above statutory language to exclude from collective bargaining only those "representatives of any public employer," "department heads," and "appointed officials" whose actual job duties satisfy the statutory test to determine whether a person is a managerial employee within the meaning of Section 1 of the Law. *City of Chicopee*, 19 MLC 1765, 1767-1768 (1993), *aff'd sub nom*, *City of Chicopee v. Labor Relations Commission*, 38 Mass. App. Ct. 1106 (1995), *citing*, *Town of Dartmouth*, 1 MLC 1257, 1259 (1975); *Waltham School Committee*, 3 MLC 1242, 1246, fn. 2 (1976).

Section 1 of the Law contains the following three-part test to determine whether a person is a managerial employee:

Employees shall be designated as managerial employees only if they (a) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer, or (c) have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not ini-

tially in effect in the administration of a collective bargaining agreement or in personnel administration.

An employee must be excluded from an appropriate bargaining unit under Section 3 of the Law if the person's actual duties and responsibilities satisfy any one of the three statutory criteria. Applying the statutory criteria to the information here, the Commission concludes that the health agent is not a managerial employee within the meaning of the Law.

Managerial employees make policy decisions that are of major importance to the mission and objectives of the public employer. *Wellesley School Committee*, 1 MLC 1299, 1400 (1975), *aff'd*, *School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112 (1978). Neither limited participation in the decision-making process, nor attendance and participation in policy-making discussions is sufficient to consider an employee "managerial," if the person's input is merely informational or advisory in nature. *Town of Medway*, 22 MLC 1261, 1268 (1995); *Town of Weyfleet*, 11 MLC 1238, 1241 (1984); *Wellesley School Committee*, 1 MLC at 1403. Rather, an employee must participate in the policy decision-making process on a regular basis, with the authority to select and implement a policy alternative, to satisfy this first criterion of a managerial employee. *Town of Plainville*, 18 MLC 1001, 1009 (1991), *citing* *Town of Agawam*, 13 MLC 1364, 1368 (1986).

The Town argues that the health agent's job duties satisfy the first criterion of the statutory definition of a managerial employee because the job description states that the health agent "performs varied duties requiring considerable judgment in the interpretation and application of laws and local regulations to frequently changing conditions and problems."

However, even assuming that this job duty arguably describes policy-making duties, the information fails to demonstrate that the health agent performs a regular, significant role in policy formulation that is of major importance to the mission and objectives to the Town and its Board of Health. *Cf. Taunton Municipal Lighting Plant*, MCR-03-5022, slip op. at p. 21-22 (LRC, August 21, 2003) [30 MLC 16] (energy supply and planning manager who has a substantial part in determining the energy supply policy and manager of special services who has a substantial role in developing a corporate strategic plan and executes and tracks those plans to maintain the employer's competitive edge in the marketplace are managerial employees); *Town of Manchester-By-The-Sea*, 24 MLC 76 (1998) (library director's input on all major policy issues, including fiscal, personnel, building maintenance, and library services constitutes significant policy formulation and determination). Absent such information, the Commission declines to extinguish the health agent's collective bargaining rights by deciding on this record that he/she is a managerial employee within the meaning of Section 1 of the Law.

Finally, the Town does not contend, nor is there any evidence to support a finding that the health agent assists to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of the Town, or has substantial responsibility involving the exercise of independent judgment of an appellate responsibility

ity not initially in effect in the administration of a collective bargaining agreement or in personnel administration.

The Town next argues that the Commission should exclude the health agent from the Union's bargaining unit because, with the changes in August 2002, the health agent is now a supervisory employee because he/she is responsible for the direct supervision of the assistant health agent/food inspector and the Board of Health secretary.

Generally, the Commission will not place supervisors and the employees they direct in the same bargaining unit. *Town of Bolton*, 25 MLC 62, 67 (1998), citing, *City of Chicopee*, 1 MLC 1195, 1196 (1974). This policy is rooted in the belief that individuals who possess significant supervisory authority owe their allegiance to their employer, particularly in the areas of employee discipline and productivity. *Id.*, citing, *City of Westfield*, 7 MLC 1245, 1250 (1980). Therefore, rather than place supervisors in the untenable position of disciplining employees on whom they rely to secure improved terms and conditions of employment through the collective bargaining process, the Commission places supervisors in a separate bargaining unit. *Id.* Supervisors and the employees they direct have different obligations to the employer in personnel and policy matters, therefore, to combine them in the same bargaining unit would likely lead to a conflict of interest within the bargaining unit. *City of Chicopee*, 1 MLC at 1197-1198. See, e.g. *Town of Eastham*, 22 MLC 1190, 1197 (1995) (Head custodian and cafeteria manager possess a degree of supervisory authority sufficient to defeat a community of interest between them and the employees they direct); *Town of Greenfield*, 5 MLC 1036, 1039 (1978) (Deputy fire chiefs possess a degree of supervisory authority sufficient in magnitude to destroy their community of interest with firefighters).

To determine whether the health agent exercises significant supervisory authority to warrant exclusion from a bargaining unit of employees he/she supervises, the Commission considers factors like the independent judgment and authority to assign and to direct the work of employees, the authority to initiate and to recommend discipline, the authority to adjust grievances, and, the independent authority to make, or the power to recommend effectively, personnel decisions like hire, transfer, suspend, promote or discharge employees. *Town of Granby*, 28 MLC 139, 142 (2001), citing, *Town of Bolton*, 25 MLC at 67.

It is well established that unit placement and coverage under the Law is based on actual, not potential job duties. *Board of Trustees of the University of Massachusetts*, CAS-3190, slip op. at 13 (LRC, September 24, 2003) [30 MLC 52] (although the mail clerk's job description appears to be analogous to certain supervisory positions, the actual duties of the mail clerk demonstrate that it is not a supervisory position); *Town of Chelmsford*, 27 MLC 41, 43 (2000), citing, *Town of Medway*, 22 MLC 1261, 1270 (1995). Here, the facts establish that the health agent will be responsible for the direct supervision of both the Board of Health's secretary and the assistant health agent/food inspector when both the assistant health agent/food inspector's position is filled and the septage information management system is implemented. However, be-

fore these two dependent events occur, the health agent does not exercise direct supervisory authority over any Town employees.

The Town describes generally the health agent's future supervisory duties to include the ability to discipline, to monitor attendance, to assign duties, and to conduct performance evaluations. However, the record fails to demonstrate the level of discipline the health agent may impose, either independently or effectively recommend to the Board of Health. See, e.g., *Town of Granby*, 28 MLC at 142 (position description that states that the foreman makes disciplinary recommendations to the superintendent does not support a finding that the foreman has effective recommendatory authority in the area of employee discipline), citing, *Town of Sturbridge*, 18 MLC 1416, 1421 (1992) (reference in position description that officers have the authority to impose discipline is insufficient by itself to establish the requisite level of disciplinary responsibility that would cause inherent conflicts in the bargaining unit). Nor does the record explain the purpose or frequency of performance evaluations, whether they become part of the employee's personnel record, whether the evaluation is independent from, or subject to further review by the Town and/or the Board of Health, and whether the evaluations are advisory in nature or used to impact directly employees' terms and conditions of employment like wage increases and promotions. *Town of Granby*, 28 MLC at 142. Without this information, the precise nature and extent of the health agent's future supervisory duties are only a matter of speculation at this time. Therefore, based on this record, the Commission declines to find that the health agent possesses significant supervisory authority over employees in the bargaining unit.

The Town next contends that the health agent is a professional employee within the meaning of Section 1 of the Law and, therefore, by the operation of Section 3 of the Law, the health agent should not be included in the Union's bargaining unit, which includes non-professional employees, unless the health agent is given the opportunity to vote for inclusion in that unit.

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 (4) 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).

The Law does not expressly prohibit bargaining units that include both professional and nonprofessional employees. Rather, Section 3 of the Law provides, in relevant part, that "[n]o unit shall include both professional and nonprofessional employees unless a major-

ity of such professional employees votes for inclusion in such unit."

The facts establish that the health agent's position or its predecessor title existed at the time of the Commission's original certification and has been included historically in bargaining Unit A. On February 2, 1987, the Town and the Union entered into an Agreement for Consent Election in bargaining Unit A. That agreement did not identify any professional employees within the meaning of Section 1 of the Law. On March 2, 1987, the Commission certified the Union as the exclusive collective bargaining representative of employees in bargaining Unit A. The Town now raises the issue for the Commission's determination.

The statutory right of professionals to decide whether they wish to be included in a bargaining unit of both professional and nonprofessional employees inures to the benefit of the professional employee, not the public employer or the union that seeks to represent those employees. Therefore, the Town lacks standing to raise the issue in this unit clarification petition. Accordingly, the Commission declines to decide whether the health agent was a professional employee at the time of the original certification, and/or whether the health agent position has evolved such that he/she is now a professional employee and, if so, what is the appropriate course of action.

Commission's rules prohibit an employee from filing a unit clarification petition.⁶ However, if the health agent desires to raise this issue, he/she may timely file a request that the Commission reinvestigate the original certification under Commission rule 456 CMR 14.15, Reinvestigation of Certification.⁷ See, *City of Woburn*, 10 MLC 1062 (1983) (Commission treats employee's motion to intervene in an employer-filed unit clarification petition as a motion to reinvestigate the certification and hearing officer decides that employee is a professional employee and modifies the certification to comport with the employee's stated desire). See also, *Town of Burlington*, 5 MLC 1234 (1978) (Commission affirms hearing officer decision that treated an employee-filed unit clarification petition, which is prohibited, as a motion to reinvestigate the certification).

Assistant Health Agent/Food Inspector

The Town argues that the assistant health agent/food inspector is a confidential employee within the meaning of Section 1 of the Law. Section 1 of the Law defines the "confidential" exclusion as follows:

Employees shall be designated as confidential employees only if they directly assist and act in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter.

The Commission has construed this statutory language to exclude those persons who have a direct and substantial relationship with an excluded employee that creates a legitimate expectation of confidentiality in their routine and recurrent dealings. *Town of*

Chelmsford, 27 MLC at 43, citing, *Town of Medway*, 22 MLC 1261, 1269 ((1995)). This exclusion has been narrowly interpreted to exclude as few employees as possible, while not unduly hindering the employer's operations. *Silver Lake Regional School Committee*, 1 MLC 1240, 1243 (1975). Regular exposure to confidential material directly related to labor relations policy or other equally sensitive policy information while directly assisting a person excluded from the Law's coverage is grounds for finding an employee confidential. *Town of Medway*, 22 MLC at 1269, citing *Framingham School Committee*, 17 MLC 1233 (1990); *Pittsfield School Committee*, 17 MLC 1369 (1990).

The Commission generally declines to determine the appropriate bargaining unit placement of a newly-created and unfilled position based on the job description alone, particularly where the union contests the accuracy of the job description. *Upper Cape Cod Regional Vocational Technical School Committee*, 9 MLC 1503 (1982). Here, the Union did not stipulate that the job description is a fair and accurate description of the job duties of the assistant health agent/food inspector. The Town represents that the assistant health agent/food inspector will perform certain duties when the position is filled that will demonstrate that he/she is a confidential employee within the meaning of Section 1 of the Law. However, we decline to exclude an employee from coverage under the Law based on duties an incumbent will perform at some future time. Coverage under the Law is based on actual, not potential job duties. *Town of Chelmsford*, 27 MLC at 43 (2000). Therefore, the Commission declines to determine whether the assistant health agent/food inspector is a confidential employee within the meaning of Section 1 of the Law and, therefore, excluded from the Union's bargaining unit.

Conclusion

For the reasons stated above, the Town's petition seeking to exclude the positions of health agent and the assistant health agent/food inspector from the Union's bargaining unit is dismissed.

SO ORDERED.

* * * * *

6. 456 CMR 14.04(2) provides that: "[I]ndividual employees may not file petitions for clarification or amendment of certification."

7. 456 CMR 14.15, Reinvestigation of Certification provides that: "[f]or good cause shown, the Commission may reinvestigate any matter concerning any certification issued by it, and after appropriate hearing, may amend, revise or revoke such certification."