

_____)	
TEAMSTERS UNION LOCAL 340,)	
)	
Petitioner,)	
)	UNIT DETERMINATION
and)	REPORT
)	
TOWN OF WARREN,)	
)	
Respondent.)	
=====)	

PROCEDURAL HISTORY

This unit determination proceeding was initiated on August 28, 2013, when Brett Miller, Secretary-Treasurer and Business Agent of Teamsters Union Local 340 (hereinafter referred to as "Teamsters"), filed a petition for unit determination with the Maine Labor Relations Board ("Board"). The petition sought a determination whether "6 public works employees (highway workers) drivers" of the Town of Warren constituted an appropriate bargaining unit for purposes of collective bargaining. The Town of Warren ("Town") filed a timely response to the petition, challenging the sufficiency of the showing of interest filed in support of the petition, objecting to the appropriateness of the proposed bargaining unit, suggesting that an appropriate unit would consist of the 3 regular full-time, non-supervisory employees in the highway worker/driver classification, and alleging that the Highway Supervisor should be excluded from the proposed unit on the grounds that the position is supervisory within the meaning of 26 M.R.S.A. § 966(1).

A unit determination hearing notice was issued on January 9, 2014, and was posted for the benefit of affected employees. The hearing was conducted on January 29, 2014. The Teamsters were represented by Mr. Miller and the Town was represented by William S. Kelly, Esq. The parties were afforded full opportunity to examine and cross-examine witnesses, to present evidence, and to make argument. The following witnesses were presented: for the Petitioner: Highway Supervisor Doug Gammon; for the Town: Town Manager Elaine Clark and Mr. Gammon. At the hearing, the Town expanded its position regarding the exclusion of the Highway Supervisor position from the proposed bargaining unit, alleging that the Supervisor was a department or division head, within the meaning of 26 M.R.S.A. § 962(6)(D), and could not lawfully be included in any bargaining unit pursuant to 26 M.R.S.A. § 966(1). The parties presented their respective arguments through post-hearing briefs, which were timely filed and duly considered in reaching this unit determination decision.

JURISDICTION

The jurisdiction of the executive director to hear this matter and to make an appropriate unit determination lies in 26 M.R.S.A. § 966(1) and (2). The subsequent statutory references in this report are to Title 26, Maine Revised Statutes Annotated, unless otherwise noted.

STIPULATION

The parties agreed that the three full-time employees in the Highway Worker/Driver classification at the Warren Public Works Department, together, constitute an appropriate bargaining unit for purposes of collective bargaining.

EXHIBITS

The following exhibits were offered by the Town without objection by the Union, and were admitted into the record:

- Town Exh. No. 1 Town of Warren Personnel Policy, as amended August 21, 2013
- Town Exh. No. 2 Warren Public Works Employee Roster
- Town Exh. No. 3 Warren Public Works Programs and Projects Organizational Chart
- Town Exh. No. 4 Letter from Interim Town Manager Glenn E. Aho to Mr. Doug Gammon, dated November 28, 2012, titled Appointment Letter
- Town Exh. No. 5 Public Works Director Job Description, adopted by Warren Board of Selectmen, Sept. 12, 2007
- Town Exh. No. 6 Memorandum from Doug Gammon to [name redacted] re: workplace performance and behavior, dated January 16, 2013
- Town Exh. No. 7 Town of Warren Employee Evaluation Form for employee Doug Gammon, PW Supervisor, completed by Glenn Aho, dated 7/12/13
- Town Exh. No. 8 Mechanic/Truck Driver Job Description
- Town Exh. No. 9 Town of Warren Employee Evaluation Form, Public Works Department, revised 4/30/13
- Town Exh. No. 10 Town of Warren Monthly Activity Report, Public Works - Doug Gammon, September 2013; Town of Warren, Capital Request Form, Calendar Year 2014 (draft) completed by Doug Gammon
- Town Exh. No. 11 Position vacancy notice, seasonal/temporary plow truck drivers, posted October 25, 2013
- Town Exh. No. 12 Town of Warren, Time Away Requests for various Public Works employees, approved by Doug Gammon, 6 pp.
- Town Exh. No. 13 Town of Warren, Oath of Office for Douglas Gammon as "Public Works Supervisor for a one year term (Expires 2013)," dated Nov. 30, 2012.
- Town Exh. No. 14 Copy of Town Exh. 4, signed by Interim Town Manager Glenn E. Aho and "Seen and Agreed" signed by Douglas Gammon, Dec. 12, 2012

FINDINGS OF FACT AND DISCUSSION

The Warren Public Works Department consists of four regular full-time employees, the Public Works Director/Highway Supervisor and three Highway Worker/Drivers. In winter months, the department also has a seasonal/temporary Plow Truck Driver, who is on-call for snow and ice control events. At the outset of the unit determination hearing, the Petitioner clarified that the Petition for Unit Determination seeks creation of a bargaining unit consisting of the four regular full-time employees.

Three issues are presented in this case: 1) is the Warren Public Works Director/Highway Supervisor a public employee within the meaning of the Act or is he exempt pursuant to § 962 (6)(D); 2) if the Director/Supervisor is a public employee, is he a supervisor who should not be included in the same bargaining unit as the employees he supervises, and 3) does the Director/Supervisor share a clear and identifiable community of interest with the employees in the Highway Worker/Driver classification so as to warrant inclusion of both classifications in the same bargaining unit.

Public Employee Status of the Warren Public Works Director/Highway Supervisor

The Town contends that the Director/Supervisor is a department head, within the meaning of § 962(6)(D), is exempt from the coverage of the Act, and under § 966(1) may not be included in any bargaining unit. The Act is remedial in nature; therefore, the exclusions must be narrowly drawn to effectuate the fundamental purpose of the statute and are to be strictly construed. *Teamsters Union Local 340 and Town of Van Buren*, Case Nos. 13-UD-07 & 13-UD-08, slip op. at 25 (December 10, 2013), citing, *State of Maine and MSEA*, No. 82-A-02, First Interim Order, slip op. at 6 (MLRB June 2, 1983). To be exempt from coverage of

the Act as a department head requires that the individual be "appointed to office pursuant to statute, ordinance or resolution for an unspecified term by the executive head or body of the public employer." Article 2:04 of the Town's Personnel Policy provides that all Town employees are "appointed" by the Town Manager. Consistent with the provisions of Title 30-A M.R.S.A. § 2636(5), the personnel policy goes on to require that "positions of Department Head status are appointed by the Town Manager and confirmed by the Board of Selectmen."

There is no direct evidence regarding how Mr. Gammon came to occupy his current position. Ms. Clark and Mr. Gammon testified that he began in the position on August 8, 2012. Town Exh. 14, was dated November 28, 2012, and was signed by Mr. Aho, who did not become the Warren Interim Town Manager until November of 2012. In addition, Mr. Gammon was not sworn into office by the Town Clerk until November 30, 2012. Ms. Clark testified that she reviewed the Town records and that "the typical copy of an appointment signed by all the selectmen" was not in Mr. Gammon's file. The evidence in the record fails to establish that Mr. Gammon's appointment to the position of Public Works Director/Supervisor was confirmed by the Selectmen, a requirement under both State law and the Town's Personnel Policy; therefore, I cannot conclude that he is a department or division head within the meaning of § 962(6)(D). I hold that Mr. Gammon is a public employee within the meaning of § 962(6) of the Act.

Supervisory Status of the Highway Supervisor

Unlike the National Labor Relations Act, which controls collective bargaining for private sector employees and prohibits supervisory employees from being represented for purposes of collective bargaining, public sector supervisory employees in

Maine not only are granted bargaining rights, but they may even be included in the same bargaining unit as the employees they supervise. Such unit inclusion is left to the sound discretion of the hearing examiner, guided by the following provision in § 966(1):

In determining whether a supervisory position should be excluded from the proposed bargaining unit, the executive director or his designee shall consider, among other criteria, if the principal functions of the position are characterized by performing such management control duties as scheduling, assigning, overseeing and reviewing the work of subordinate employees, or performing such duties as are distinct and dissimilar from those performed by the employees supervised, or exercising judgment in adjusting grievances, applying other established personnel policies and procedures and in enforcing a collective bargaining agreement or establishing or participating in the establishment of performance standards for subordinate employees and taking corrective measures to implement those standards.

The intent of this three-part test is to determine whether an individual supervisor exercises a sufficient level of control over employment-related matters that would likely result in a conflict of interest. See *Richmond Employees Ass'n and Town of Richmond*, No. 94-UD-09, slip op. at 30 (MLRB Apr. 26, 1994).

The first prong of the § 966(1) test requires an evaluation of whether the principal functions of the Highway Supervisor involve scheduling, assigning, overseeing and reviewing the work of the employees supervised. The Supervisor does very little scheduling. The public works crew, consisting of three regular employees and the Supervisor, has a standard workday, Monday through Friday, from 7:00 A.M. to 3:30 P.M., with a half-hour lunch period from 11:30 A.M. to Noon. Outside of normal business hours during winter, the Supervisor monitors road conditions and, using equipment he carries in his truck, determines that the roads need treatment or plowing. If such work is required, the

Supervisor calls out the crew and drives a plow route himself, incurring overtime expense for the Town. The Knox County Sheriff's Department can also determine that road conditions require action by the public works crew. The Highway Supervisor approves employee requests for paid time off; however, the Town Manager testified that she was unsure whether the Supervisor consults with the Town Manager before approving such requests.

In most instances, the public works crew operates as a four-person team, so assigning work is not a major task. The three employees and the Supervisor work interchangeably, performing the various tasks on the job site. Occasionally, a job requires a smaller crew or involves greater skill operating heavy equipment. The Supervisor assigns such work, based on his knowledge of each employee's skills and abilities.

The Supervisor reviews the work of the public works employees, informally through daily observation and comment. In addition, the Supervisor performs a formal employee performance evaluation annually, noting the employee's strengths and weaknesses, suggesting areas for improvement, and recommending training that would be helpful. While the performance evaluation form indicated a minimum numerical score required for the employee to be "eligible for wage increases," there was no evidence in the record of any employee having received a wage adjustment based on the evaluations. In addition, the performance evaluation form contains a signature line for the Town Manager and there was no evidence regarding the weight accorded to the evaluations in actual practice. Given that most of the Supervisor's time is spent working alongside and performing the same job duties as the other department employees, it is difficult to conclude that

supervisory functions constitute the "principal functions" of the Supervisor's employment with the Town.¹

The second prong of the supervisory employee test is that the person performs duties that are distinct and different from those of the employees supervised. This criterion was explained in *State of Maine and MSEA*, No. 91-UC-04, slip op. at 15 (MLRB Apr. 17, 1991), as follows:

[D]uties contemplated by the "distinct and dissimilar" criterion include those in connection with hiring (or making recommendations), transfers, layoffs and recalls, and promotions - duties that substantially align the interests of the supervisor with the interests of the employer and cause conflicts of interests [with other employees].

There is no evidence in the record regarding the role, if any, the Supervisor has played in hiring, layoffs and recalls, or promotions of any of the regular public works employees that the Town agrees should be in the bargaining unit.

The Public Works Department has funding for a seasonal employee to work in the winter months. On October 25, 2013, a position vacancy announcement was issued by the Town, seeking candidates to fill the seasonal position for the 2013-14 winter season. Based on his knowledge of the work to be performed and the necessary qualifications for a successful candidate the Supervisor drafted questions for the interview process. Two candidates were interviewed by the Town Manager. The Supervisor participated in the interview of one candidate; the other candidate was interviewed while the Supervisor was on vacation and

¹ There are circumstances in which a supervisor, who spends most of their time performing the same work as the employees supervised, is nevertheless primarily engaged in supervision, such as where the subordinate employees are inexperienced and require constant supervision and direction. See, *Freeport Police Benevolent Association and Town of Freeport*, No. 12-UD-05, slip op. at 7-8 (June 19, 2012), aff'd, 13-UDA-01 (MLRB Nov. 29, 2012)

one of the other full-time public works employees participated in the interview. The successful candidate was chosen by the Town Manager. Before the hiring process was completed, an extra hand was required, so the Supervisor hired a *per diem* employee, pending completion of the process.

Subsequent to the hiring of the seasonal employee, one of the regular public works employees became very ill, requiring hospitalization. During the winter months, the Supervisor, the three Highway Worker/Drivers, and the seasonal employee are all needed to cover the 5 plowing routes required to keep the Town roads safe and passable. The Town Manager and the Supervisor decided to hire the unsuccessful candidate for the seasonal position as a temporary replacement for the ill employee.

Additional "distinct and dissimilar" duties performed by the Supervisor include preparation of the annual departmental budget, including capital project requests; overseeing maintenance and repair of the Town equipment; preparation of monthly reports to the Selectmen, summarizing public works activities, equipment, and personnel for the month; and serving as the contact person for citizen complaints.

It is easy to understand how preparation of a departmental budget in some circumstances could result in the alignment of the preparer with management and result in conflicts with the department employees. In the present case, the Supervisor prepares a "current services" budget for the department, costing out the personnel, equipment, and materials costs for each of the projects planned, based on the prior year's experience. On capital projects, the Supervisor requests that the work be authorized and estimates cost. The impact of the Supervisor's budget work is attenuated here both by the amount of effort he dedicates to the task and to the nature of the Town's budget-

approval process. The Supervisor works on the department budget once a year and testified that involves "five, six hours, total." Second, the Supervisor presents his draft budget to the Town Manager for review and approval; the Supervisor then presents the resulting budget to the Board of Selectmen and the Town Budget Committee; and finally the budget is presented to the Town Meeting for review and final approval by the citizens.

The Supervisor's discretion in overseeing the maintenance and repair of the Town equipment is similarly limited. When a piece of equipment requires maintenance or repair, the Supervisor secures estimates for the work, draws up a purchase order, and presents it to the Town Manager for review and approval. This applies to all public works expenditures, including budgeted items. Neither this activity nor the preparation of the general monthly activities report to the Selectmen in any way creates a conflict of interest between the Supervisor and the other employees.

The final evidence provided by the Town relating to the "distinct and dissimilar" criterion was the Town Manager's testimony that the Supervisor handles all citizen complaints that relate to the public works department or to town roads in general. On the other hand, the Supervisor testified that one of the other public works employees is the department's "mailbox officer," responding to plow mailbox strikes and other mailbox issues. In addition, the Supervisor stated that another employee was the first to respond to a citizen's concern regarding a school bus turn-around, one of the examples of the Supervisor's "distinct and dissimilar" activities cited by the Town Manager. In the circumstances, I conclude that while the Supervisor may be responsible for responding to citizen inquiries, he often delegates that function to other department employees.

The other examples of the Supervisor's "distinct and dissimilar" functions neither tend to align the Supervisor with management nor are likely to give rise to conflicts with the other regular department employees. I conclude that the Supervisor does not perform "distinct and dissimilar" functions within the meaning of the second time of the § 966(1) test.

The third prong of the supervisory employee test is whether the individual in question exercises discretion in adjusting grievances, applying established personnel policies, or participates in establishing performance standards for the subordinate employees and takes corrective action to assure compliance with those standards. Once again, the thrust of this criterion is whether the position in question is more closely aligned with management and should, therefore, be assigned to a different bargaining unit than the other employees to avoid conflicts of interest with them.

In presenting its case, the Town quite appropriately stressed the relationship between the Supervisor's authority pursuant to the Town Personnel Policy to impose discipline on the subordinate employees and to adjust grievances. Like the other two prongs of the § 966(1) test, the degree of discretion permitted to be exercised in these areas helps to define what a supervisor is and does in practice. Article V, § 5:03 of the Warren Personnel Policy states:

A department supervisor shall have the right to give counseling, verbal or written reprimands to an employee within the supervisor's department whose work performance or conduct justifies such action. Matters potentially requiring further discipline shall be referred to the Town Manager for action. A copy of all disciplinary or investigative materials will be placed in the personnel file. The employee shall have the right to appeal as outlined in the grievance procedure.

This section goes on to provide that the Town Manager has the same authority to discipline as the departmental supervisors. In addition, the Town Manager may place an employee on paid administrative leave, all without advance notice or hearing. After having given written notice of the charges and the potential consequences and subsequent to a hearing, where the employee may be represented "by a union official, attorney or other representative," the Town Manager may "demote, suspend, or terminate any employee whose work performance or conduct justifies such action." All discipline is subject to review through the grievance procedure set forth in the Policy.

The Supervisor testified that he "can't issue discipline; that's not within [his] scope." The Supervisor's opinion appeared to be based on his understanding of what constitutes discipline. Not only does the Personnel Policy authorize the Supervisor to issue discipline but, on January 16, 2013, the Supervisor issued a counseling memo to an employee that was placed in the employee's personnel file. The Personnel Policy does not require or even mention the principle of progressive discipline and there was no evidence regarding what weight, if any, the Town Manager would give to counseling or reprimands issued by the Supervisor, or the absence thereof, when considering the imposition of more serious discipline.

Article V, § 5:00 of the Personnel Policy provides that supervisory personnel serve as the first step of the grievance procedure. Typical of standard grievance procedures, the stated goal in Warren's policy "is to settle the employee's grievance on as low an administrative level as possible" and "[e]mployees are encouraged to discuss problems openly and honestly with their supervisors prior to filing a grievance." Step One of the grievance procedures provides that, within 5 days of receipt of

a written grievance, the direct supervisor must hold a meeting regarding the grievance and must issue a written decision within five days after that. The Supervisor testified that he is aware of the grievance procedure under the Personnel Policy, but he has never adjusted a grievance.

Given that depending on the time of year the Supervisor constitutes 20 or 25% of the entire public works staff of the Town of Warren, it is not at all surprising that the principal functions of the Supervisor consist of performing the same work as and working alongside the other employees in the department. The record did not support a conclusion that the Supervisor performed work that is "distinct and dissimilar" within the scope of the second line of the § 966(1) test. Although the Supervisor has the authority to issue discipline in the form of counselling, and oral and written reprimands, the record established that he has issued one counselling memorandum. The Supervisor has never adjusted a grievance. The scope and degree of supervisory functions exercised by the Public Works Supervisor do not warrant assigning that position to a separate bargaining unit from that comprised of the subordinate employees.

Community of Interest Analysis

The third major issue presented is whether the Supervisor shares a clear and identifiable community of interest with the other regular full-time public works employees. If so, § 966(2) of the Act provides that the four employees together would constitute an appropriate unit for purposes of collective bargaining. The board has codified its long-standing community of interest criteria in Chapter 11, § 22, of its Rules as follows:

§ 22. Criteria for Appropriate Bargaining Units. In determining whether a particular position should be included in a unit or whether a proposed unit is

appropriate, the hearing examiner is required to apply the specific provisions in the Act governing the employees in question. . . .

3. Community of Interest. In determining whether a community of interest among employees exists, the hearing examiner shall, at a minimum, consider the following factors: (1) similarity in the kind of work performed; (2) common supervision and determination of labor relations policy; (3) similarity in the scale and manner of determining earnings; (4) similarity in employment benefits, hours of work and other terms and conditions of employment; (5) similarity in the qualifications, skills and training of employees; (6) frequency of contact or interchange among the employees; (7) geographic proximity; (8) history of collective bargaining; (9) desires of the affected employees; (10) extent of union organization; and (11) the employer's organizational structure.

Community of interest factors 1 through 8 and 11 support the conclusion that the Supervisor and the Highway Worker/Drivers of the Warren Public Works Department share a clear and identifiable community of interest and, together, those classifications constitute an appropriate bargaining unit for purposes of collective bargaining. I conclude that the requisite community of interest exists between the highway supervisor and the highway worker/driver classifications.

The Supervisor does the same work as the other public works employees on a daily basis, including operating equipment, driving trucks, plowing roads, operating a chainsaw, flagging, and other similar work on road construction and maintenance projects. The Supervisor has additional job functions but, as noted above, they do not constitute a significant portion of the Supervisor's work time.

The Town Manager supervises all of the public works employees, reviews and signs off on all employee performance evaluations, and is the only person who can demote, suspend, or

terminate any of the public works employees. The Supervisor observes the performance of the public works employees and serves as their intermediate supervisor, subject to the authority of the Town Manager.

The labor relations policy for all of the public works employees is determined by the Town's personnel policy. All of the public works employees are compensated on an hourly basis, including the Supervisor. The Supervisor is paid approximately \$20.00 per hour and the other regular employees earn approximately 25% less. All of the public works employees' employment benefits and other terms and conditions of employment are determined by the Town's Personnel Policy. The Supervisor's regular work week is the same as that of the other employees.

All of the public works employees require a practical knowledge of road construction materials and methods and the operation of road construction equipment. This is the type of knowledge developed on-the-job or through technical training. In addition, the Supervisor is expected to have experience as a labor foreman on major road construction and maintenance activities.

The Supervisor is in constant, daily contact with the other public works employees. In most instances, all of the public works employees work together as a four-person crew. There was no history of collective bargaining for any of the public works employees. The Town of Warren has a Town Meeting, Board of Selectmen, Town Manager form of government. The public works department is a separate and distinct operational unit of the Town whose unique status is reflected by Article 6:01 of the Personnel Policy. This separate identity supports the creation of a separate bargaining unit of public works employees.

Since there was no evidence of the desires of the affected employees regarding the composition of the bargaining unit or regarding the extent of union organization among Town employees in the record, these factors cannot be said to militate either way regarding the presence or absence of the requisite level of community of interest.

CONCLUSION

On the basis of the foregoing facts and discussion and pursuant to the provisions of 26 M.R.S.A. § 966, the petition for unit determination filed on August 28, 2013, by Brett Miller, Secretary-Treasurer and Business Agent of Teamsters Union Local 340, is granted. The following described unit of employees of the Town of Warren is held to be appropriate for purposes of collective bargaining:

INCLUDED: Highway Supervisor
Highway Worker/Driver

EXCLUDED: All other employees of the Town of Warren

A bargaining agent election for this unit will be conducted for this unit forthwith.

Dated at Augusta, Maine, this 8th day of April, 2014.

Marc P. Ayotte
Executive Director

The parties are hereby advised of their right, pursuant to 26 M.R.S.A. § 968 (4), to appeal this report to the Maine Labor Relations board. To initiate such an appeal, the party seeking appellate review must file a notice of appeal with the Board within fifteen (15) days of the date of issuance of this report. See Chapter 10 and Chap. 11 § 30 of the Board Rules.