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MAINE STATE EMPLOYEES ASSOCIATION,		)	
		)	
	Petitioner,	)	
		)	
	and	)	UNIT CLARIFICATION
		)	REPORT
STATE OF MAINE,		)	
		)	
	Employer.	)	
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PROCEDURAL HISTORY

This unit clarification proceeding was initiated on July 1, 2003, when Timothy L. Belcher, Esq., attorney for the Maine State Employees Association ("MSEA" or "union"), filed a Petition for Unit Clarification with the Maine Labor Relations Board ("Board") for a determination whether the positions in the Biologist II classification, currently included in the State Employee Professional and Technical Services Bargaining Unit ("Pro-Tech Unit") should be included in the Supervisory Services Bargaining Unit ("Supervisory Unit") pursuant to § 979-E(3) of the State Employees Labor Relations Act ("SELRA"). On July 15, 2003, the State of Maine Bureau of Employee Relations ("State") filed a Motion to Extend Time to File Responses to Unit Clarification Petitions, which motion was granted.<sup>1</sup> In the months following the filing of the petition, the parties and Board staff participated in several prehearing conferences in an attempt to

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<sup>1</sup>The petitioner simultaneously filed a second petition relating to the Clerk IV positions, Case No. 04-UC-02. A separate hearing and decision is being conducted regarding that petition. In neither case has the employer filed a response to the unit clarification petition. However, the parties are in agreement that the jurisdictional elements for a unit clarification petition have been met in this case. The union has not filed any motion relating to the employer's failure to file a response to the petitions.

determine whether the parties could agree to the movement of some of the Biologist II positions from the Pro-Tech Unit to the Supervisory Unit. To this end, the parties crafted a survey to be sent to all employees holding the Biologist II positions to help determine their supervisory status. The surveys were sent to all employees holding the Biologist II positions on October 2, 2003, by Board staff. Board staff handled and compiled the surveys that were returned.

During the course of these proceedings, the number of Biologist II positions held in state government remained constant at 31 (certain positions were vacant at times). On February 3, 2004, the parties submitted an Agreement on Appropriate Bargaining Unit that moved the positions of 26 Biologist II's from the Pro-Tech Unit to the Supervisory Unit. All of the positions involved were employed by the Department of Environmental Protection, the Department of Inland Fisheries and Wildlife, or by the Atlantic Salmon Commission. On July 14, 2004, (the date of the hearing in this matter), the parties submitted a second Agreement on Appropriate Bargaining Unit that moved the positions of three Biologist II's, all employed by the Department of Inland Fisheries and Wildlife, from the Pro-Tech Unit to the Supervisory Unit. At the time of the hearing, therefore, only two positions remained in dispute, both employed by the Department of Environmental Protection.

After due notice, an evidentiary hearing on the petition as it related to these two remaining positions was held by the undersigned hearing examiner on July 14, 2004, at the Board conference room in Augusta, Maine. Timothy L. Belcher, Esq., appeared on behalf of the MSEA. Joyce A. Oreskovich, Esq., appeared on behalf of the State. Prior to the commencement of the formal hearing, the parties met with the hearing examiner to offer exhibits into evidence and to formulate stipulations of fact. The union presented as its witnesses Jeanne DiFranco and

David Halliwell, both Biologist II's with the Department of Environmental Protection. The State Bureau of Employee Relations presented no witnesses. The parties were given the opportunity to examine and cross-examine witnesses, offer evidence and present argument. The parties submitted written closing arguments August 9, 2004.

#### JURISDICTION

The jurisdiction of the executive director or his designated hearing examiner to hear this matter and make a determination lies in 26 M.R.S.A. § 979-E.

#### STIPULATIONS

The parties stipulated to the following:

The factors required for a unit clarification petition are present in this matter in that 1) there is currently a certified or recognized bargaining representative, 2) there is no question concerning representation, 3) the circumstances surrounding the formation of the existing bargaining unit have changed sufficiently to warrant modification in the composition of the bargaining unit, and 4) the parties are unable to agree on appropriate modifications as this relates to the two positions still at issue in this matter.

#### EXHIBITS

The following exhibits were offered into evidence without objection:

Union-1	DiFranco Supervisory Status Survey
Union-2	Letter dated August 29, 2001, and accompanying paperwork related to reclassifying of DiFranco's position from

Biologist I to Biologist II

Union-3 Two e-mails from Andrew Fisk dated  
February 25, 2004, and March 2, 2004

Union-4 Administrative Report of Work Content Form  
completed May 20, 1998, regarding Biologist  
II position held by Halliwell

#### FINDINGS OF FACT

##### Findings regarding Jeanne DiFranco

1. Jeanne DiFranco has been employed by the Department of Environmental Protection ("DEP") for 15 years. She was hired as an Environmental Specialist II, then promoted to Environmental Specialist III, and then promoted to Biologist I. Her position was reclassified to Biologist II effective November, 2000.

2. Ms. DiFranco is employed in the Bureau of Land and Water Quality, Division of Environmental Assessment. The Division is divided into several units. Each unit is headed by a Biologist III or an Environmental Specialist IV (both positions currently in the Supervisory Unit). Ms. DiFranco is employed in the biological monitoring unit headed by Susan Davies, a Biologist III.

3. The employees in the biological monitoring unit are responsible for developing methods of assessment and assessing rivers, streams and wetlands in the state, reviewing projects that impact these resources, and providing information and technical assistance to other DEP programs. The unit is divided into two areas: rivers and streams (headed by Leon Tsomides, Biologist II) and wetlands (headed by Ms. DiFranco).

4. The wetlands monitoring program started in 1998 as a pilot project funded by the U.S. Environmental Protection Agency ("EPA"). Ms. DiFranco's job involves developing and implementing a wetlands monitoring program for the state, working at the state and federal level to develop policies regarding the monitoring of

wetlands, writing grants and seeking funding for the wetlands monitoring program, and creating budgets for her program.

5. The wetlands monitoring program has, at times, utilized staff to assist Ms. DiFranco in her work, and it has been part of Ms. DiFranco's job to supervise this staff. For approximately six months in each of the years 2001, 2002, and 2003, a full-time employee was employed to work under Ms. DiFranco in the wetlands program, hired by Ms. DiFranco through a temporary staffing agency. Since March, 2004, to the present time, an acting capacity full-time Environmental Specialist II has been employed to work under her, hired and supervised by Ms. DiFranco (the individual filling this position was the same individual who had been employed through the temporary staffing agency for two years). This arrangement is not permanent, however, as the acting capacity position is "on loan" from another program within the DEP, and will likely end in January, 2005, unless the program "loaning" the position continues to find the position unneeded.

6. Ms. DiFranco set up the interviews and hired the acting capacity Environmental Specialist II working in the wetlands program. She trained the employee, created her work program, and evaluates her work. She helped obtain proper ergonomic equipment for the employee to use. She signs her time sheet.

7. Each year, Ms. DiFranco also supervises a field crew of several full-time or seasonal DEP employees, and accompanies the crew in doing hands-on monitoring of wetlands, often in remote areas of the state. This occurs for approximately four weeks each summer and four weeks each fall. Ms. DiFranco selects the crew, equips them, and directly supervises them on a day-to-day basis while they are doing the field work.

8. The other program that is part of the biological monitoring unit, the rivers and streams assessment program, is a more established program. Mr. Tsomides, who heads this program, supervises one full-time Biologist I and one seasonal

Conservation Aide to assist him in this program. Mr. Tsomides holds one of the 29 Biologist II positions that the parties have agreed should be moved from the Pro-Tech Unit to the Supervisory Unit, as part of this petition.

9. Ms. DiFranco's supervisors have worked to get permanent full-time staff to assist her in the wetlands program. There is not a lack of funds for the position *per se*, but an inability to obtain permission to add a permanent state position for the program through the legislative process.

10. An Administrative Report of Work Content ("FJA") was written regarding Ms. DiFranco's job in 2000, resulting in the reclassification of her position from Biologist I to Biologist II (Union Exh. No. 2). The portion of the report describing the tasks of her position states that she "directs, advises, oversees and trains field crew personnel to achieve wetland monitoring goals and objectives."

11. When the head of the biological monitoring unit (Ms. Davies, Biologist III) was on a six-month leave in 2003 - 2004, the position was held in acting capacity for three months by Ms. DiFranco and for three months by Mr. Tsomides.

12. In January, 2004, Ms. DiFranco was sent by her department to the Maine Leadership Institute, a three-day training for state employee managers and supervisors.

13. Due to her job responsibilities, Ms. DiFranco views herself as a supervisor and believes she has a community of interest with employees in the Supervisory Unit.

#### Findings regarding David Halliwell

14. David Halliwell has been employed by the Department of Environmental Protection for 5 years. He was hired as a Biologist II and remains in that position.

15. Mr. Halliwell is also employed in the Bureau of Land and Water Quality, Division of Environmental Assessment.

Mr. Halliwell is employed in the lake assessment unit within the Division, a unit headed by Ray Bouchard, Biologist III.

16. The employees in the lake assessment unit are responsible for developing methods of assessment and assessing lakes in the state and for reviewing projects that impact these resources. The unit is divided into three programs: baseline monitoring (headed by Linda Bacon, Biologist II), invasive species (headed by John McPhedran, Biologist II) and nutrients and pollutants (headed by Mr. Halliwell, Biologist II).

17. Mr. Halliwell's job involves studying and creating remediation plans for the 33 lakes in Maine which do not meet water quality standards under the Clean Water Act. His job particularly involves working with "stakeholder" groups and associations in watersheds of some of these 33 lakes. These groups and associations are often the recipients of federal grants to restore the lakes in question, based on the recommendations of Mr. Halliwell's program. His position also involves grant and report writing, and developing and tracking grants for work done by groups outside the DEP.

18. The lake assessment program has, at times, utilized staff to assist Mr. Halliwell in his work, and it has been part of Mr. Halliwell's job to supervise this staff. From the time of his hire until sometime in 2003, a half-time Biologist I was employed to work under Mr. Halliwell in the lake assessment program, hired by Mr. Halliwell and Mr. Bouchard. Mr. Halliwell was this employee's supervisor. Mr. Halliwell attended new employee orientation as this employee's supervisor. He trained the employee, and evaluated and monitored his work. He signed his time sheet.

19. This half-time Biologist I resigned from his position. The DEP then moved the position to another program within the Department.

20. Mr. Halliwell works closely with a quasi-governmental

entity called the Maine Association of Conservation Districts ("MACD"), an umbrella organization of various soil and water conservation districts in the state. The MACD employs an executive director. In recent years, the MACD has received federal money to hire additional employees (a project coordinator and two part-time employees) to work on lake remediation projects. While these three MACD employees are not state employees, Mr. Halliwell effectively supervises them in their work. He has created work plans for these employees, meets with them regularly (usually at DEP offices), and evaluates their work. He has supplied them with equipment.

21. The work of these three MACD employees is funded with grants from the EPA. The DEP has a "partnership performance" agreement with the EPA. A major part of Mr. Halliwell's job is the oversight and coordination of the work of these MACD employees; Mr. Halliwell's job evaluation is, in part, based on his successful oversight of these employees and their work on the plans that he has developed.

22. The other Biologist II's who work in the lake assessment unit supervise one or more state employees. Ms. Bacon, who heads the baseline monitoring program, supervises one Biologist I. Mr. McPhedran, who heads the invasive species program, supervises one Biologist I and one Environmental Specialist. Ms. Bacon and Mr. McPhedran both hold one of the 29 Biologist II positions that the parties have agreed should be moved from the Pro-Tech Unit to the Supervisory Unit, as part of this petition.

23. An Administrative Report of Work Content ("FJA") was written regarding Mr. Halliwell's job in 1998 when he was hired (Union Exh. No. 4). The portion of the FJA describing the tasks of his position states that he "supervises personnel within the Lakes Program and also outside the program on a project-specific basis."

24. Mr. Halliwell was sent by his department to "Managing



in State Government" training, a precursor to the Maine Leadership Institute, a training for state employee managers and supervisors.

25. Due to his job responsibilities, Mr. Halliwell views himself as a supervisor and believes he has a community of interest with employees in the Supervisory Unit.

#### Other findings

26. Twenty-six employees holding the Biologist II position completed and returned the supervisory status survey. All of these positions have since been transferred from the Pro-Tech Unit to the Supervisory Unit by agreement of the parties. Of these employees, the majority indicated that they supervise one, two, or three permanent state employees. A few stated that they supervised as many as four or five permanent state employees. Many employees wrote that they also supervised some seasonal, project or contract positions.

27. Of the employees completing the surveys, several indicated that they supervised one or no full-time state employees. These included: Merry Gallagher (no permanent positions, one project position); Charles Hulsey (one permanent position, numerous seasonal contractors); Douglas Kane (one permanent position, numerous seasonal contractors); Tim Obrey (no permanent positions, one project position); James Stahlnecker (one permanent position, one seasonal position); Joseph Wiley (no permanent positions, one 16-week seasonal position); and Jeffrey Williams (no permanent position, assures contract compliance by foresters and logging contractors to whom he awards contracts).

28. Of the employees completing the surveys, several (including Richard Hoppe, Thomas Schaeffer, and James Stahlnecker) indicated that they exercised some level of supervisory authority over employees working for the U.S. Department of Agriculture.

29. The parties were aware of no job classifications in state government being "split" between more than one bargaining unit.

#### DISCUSSION

The parties stipulated that the various threshold requirements for a unit clarification petition, defined in § 979-E(3) are present in this matter. Therefore, the executive director has jurisdiction to consider this petition. The sole issue presented is whether the two Biologist II positions held by Ms. DiFranco and Mr. Halliwell should remain in the Pro-Tech Unit, or whether they should be moved to the Supervisory Unit, as have the other 29 Biologist II positions who were moved by the agreement of the parties. As the parties have been unable to agree whether these two positions should remain in the Pro-Tech Unit or be moved to the Supervisory Unit, the hearing examiner, as designee of the executive director, may make this decision pursuant to § 979-E(1).

In making the determination whether these two positions should be moved to the Supervisory Unit, the primary question is whether these positions share a "community of interest" with the positions currently in the Supervisory Unit. SELRA contains the same "community of interest" language as the other state collective bargaining laws. § 979-E(2) provides:

In order to insure to employees the fullest freedom in exercising the rights guaranteed by the chapter, to insure a clear and identifiable community of interest among employees concerned, and to avoid excessive fragmentation among bargaining units in State Government, the executive director of the board or his designee shall decide in each case the unit appropriate for purposes of collective bargaining.

The requirement that the hearing examiner examine the community of interest of positions in a bargaining unit was explained by

the Board over 20 years ago (examining identical language in the Municipal Public Employees Labor Relations Law), and is still valid today:

Title 26 M.R.S.A. § 966(2) requires that the hearing examiner consider whether a clear and identifiable community of interest exists between the positions in question so that potential conflicts of interest among bargaining unit members during negotiations will be minimized. Employees with widely different duties, training, supervision, job locations, etc., will in many cases have widely different collective bargaining objectives and expectations. These different objectives and expectations during negotiations can result in conflicts of interest among bargaining unit members. Such conflicts often complicate, delay and frustrate the bargaining process.

AFSCME and City of Brewer, No. 79-A-01, at 4, 1 NPER 20-10031 (MLRB Oct. 17, 1979).

In determining whether employees share the requisite "community of interest" in matters subject to collective bargaining, the following factors, at a minimum, must be considered: (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 among the 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. Chap. 11, § 22(3) of the Board Rules.

The community of interest factors are often examined in the context of creating a new bargaining unit. See e.g., Portland Administrative Employees Ass'n and Portland Superintending School Committee, No. 86-UD-14 (MLRB Oct. 27, 1986), aff'd, No. 87-A-03

(MLRB May 29, 1987) (the employees' right to self-organization is best protected when their judgment on the appropriate unit is respected, as long as the positions share the community of interest required). In the present matter, however, the bargaining units at issue have existed for over 25 years. It is instructive to briefly review the creation of the state bargaining units in order to make a proper determination in this case.

In 1976, after months of hearings, the executive director issued a unit determination report creating seven state government bargaining units: Administrative Services; Professional and Technical Services; Institutional Services; Law Enforcement, Public Safety and Regulatory Services (Non-Police); State Police Services; Operations, Maintenance and Support Services; and Supervisory Services. Council No. 74, AFSCME and Office of State Employee Relations, No. 75-UD-04, et al. (MLRB Sept. 22, 1976). The Executive Director opted not to establish bargaining units based on departmental lines, but rather grouped job classifications that shared a community of interest. With the exception of the State Police Services bargaining unit, the bargaining units each contained job classifications which cut across departmental lines. In all cases but one, entire job classifications were placed in one bargaining unit or another; job classifications were not "split" based on specific job duties.<sup>2</sup>

For each bargaining unit created, the executive director gave a summary regarding the similarities between the classifications placed in the bargaining unit, and described how

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<sup>2</sup>The only exception noted in the 1976 report was the Custodian classification, which was included in both the Institutional Services Unit and the Operations, Maintenance and Support Unit. The Executive Director recommended that the problem of splitting a job classification between two units be resolved by renaming the Custodian classification in the Institutional Services unit. Council No. 74, AFSCME and Office of State Employee Relations, *supra*, No. 75-UD-04, at 12.

these classifications shared a community of interest for purposes of collective bargaining. When the Professional and Technical Services Unit was created, the positions of Biologist I, Biologist II, Biologist III, and Biologist IV, were all placed in this unit.<sup>3</sup> The executive director stated that:

Employees in this unit generally possess a post-secondary school education and/or are involved in the performance of professional or technical functions which require specialized training and, in some instances, include a license or registration requirement. This specialized training is to be distinguished from general academic preparation or participation through an apprenticeship or training program. The work product of employees in this unit may be of an intellectual nature and may vary in content and scope although usually performed during a normal work week. These employees may have to exercise discretion in scheduling and performing their tasks and these tasks may be of a nature which may not be standardized (i.e., not scaled on productivity schedules commonly associated with routine, manual or physical tasks). These employees frequently perform interrelated work in which the employee-supervisor relationship is only incidental to the work produced. Job performance for these employees frequently qualifies them for promotions to positions of a similar nature with increased responsibilities and increased compensation. They may be involved in analysis, design, construction, operation and/or maintenance of special programs and, consequently, consider themselves as "professional" and they may affiliate with professional organizations. These employees are concerned with job fulfillment, professional status, incentive awards, and in-service or educational benefits to a point which may distinguish them from other state employees. Of paramount importance is parity of pay and professional affiliations with counterparts in the private sector. These employees are primarily of the "white collar" variety and frequently associate with other "white collar" workers

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<sup>3</sup>It is not clear to the hearing examiner whether the classification of Biologist IV still exists. The parties agreed to move the Biologist III position from the Pro-Tech Unit to the Supervisory Unit in 1990.

in the performance of their duties.

In creating the Supervisory Personnel Services Unit, the executive director stated that:

Employees in this unit fill "middle management" positions of a supervisory nature as contemplated in Section 979-E of the State Employees Labor Relations Act but are not excluded per se from coverage thereunder pursuant to the provisions of Section 979-A, Paragraph 6. These employees are responsible for the direction and efficient and effective utilization of other employees and, under collective bargaining, will assume varying degrees of responsibility for contract administration (i.e., criteria set forth in Section 979-E of the Act). These employees have special interest in job content, extent and nature of supervision, promotional opportunities and managerial/supervisory training and development.

A review of the present collective bargaining agreements for the Pro-Tech and Supervisory units show that classifications in each unit still cut across departmental lines. Based on a review of classification titles alone, the classifications within each bargaining unit have very different day-to-day job functions.

Over the years, the parties have filed numerous agreements with the Board placing new classifications in the appropriate bargaining unit, excluding some classifications under SELRA from a bargaining unit, or moving classifications from one bargaining unit to another. A review of the Board files regarding the Pro-Tech and Supervisory units shows very few matters on bargaining unit placement have ever been litigated to decision by a hearing examiner. The parties have presumably created, through agreement and negotiation, their own internal guidelines regarding community of interest and the proper unit placement of classifications.

The hearing examiner has reviewed this history to underscore the rather unique posture of this case. While the community-of-interest standard is clearly the proper standard to apply, the

hearing examiner has very little information regarding the interests that the classifications in the two bargaining units share. A review of the Supervisory Unit collective bargaining agreement shows an extremely diverse group of classifications in that unit including, by example: Aircraft Mechanic Supervisor, Assistant Director of Audits, Assistant Executive Director of Board of Nursing, Chemist III, Business Manager I, Chief Motor Vehicle Examiner, Correctional Officer III, Ground Equipment Supervisor, Library Section Supervisor, Principal, Plumber Supervisor, Senior Tax Examiner, State Police Lieutenant, and Systems Group Manager. The classifications in the Supervisory Unit supervise employees in all of the other bargaining units and even other employees in the Supervisory Unit. Since these classifications are so dissimilar in terms of training, experience, pay, supervision, etc., the hearing examiner can conclude only the obvious: that the primary factor that unites the interests of these classifications is simply that they are supervisors. The nature and extent of supervisory duties performed by each classification (or even by different positions within each classification) undoubtedly varies as well.

Section 979-E(1) of SELRA provides guidance on when supervisory employees should be excluded from a bargaining unit:

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 Board has often interpreted the parallel provision in the MPELRL, 26 MRSA § 966(1), usually in determining whether supervisory employees may be placed in the same bargaining unit as the employees whom they supervise. In Penobscot Valley Hospital and Maine Federation of Nurses and Health Care Professionals, No. 85-A-01, at 8 (MLRB Feb. 6, 1985), the Board stated:

Except in instances where the resulting one- or two-member supervisory unit would contravene our policy of discouraging the proliferation, through fragmentation, of small bargaining units, we have approved the creation of separate supervisory units. . . . The purpose of creating separate supervisory employee bargaining units is to minimize potential conflicts of interest within bargaining units, between supervisors and their subordinate employees, as well as to lessen conflicts of loyalty for supervisors between duty to their employer and allegiance to fellow unit employees.

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

Applying the language of § 979-E(1) to this matter, Ms. DiFranco performs many of the supervisory functions outlined in this three-part test. She assigns, oversees and reviews the work of the Environmental Specialist II who works for her. She also assigns, oversees and reviews the work of the part-time seasonal crews put together to perform field work with her. As the manager of the wetlands evaluation program, Ms. DiFranco performs many duties that are distinct and dissimilar from employees whom she supervises, such as policy-making and grant writing, that align her more with the interests of management than with the interests of workers whom she supervises.



Ms. DiFranco interviewed and hired the Environmental Specialist II, first through a temporary agency and, more recently, as a direct state employee. She established performance standards for this employee. While she has not needed to "adjust grievances" for this employee or to take corrective measures regarding this employee, she has authority to do so.

As perhaps with most supervisors, the amount of time Ms. DiFranco must devote to supervision is not constant. For instance, when Ms. DiFranco first hired the current Environmental Specialist II, she needed to devote more time to her training and oversight of her work. At those times of the year when Ms. DiFranco oversees the field crew, much of her time is devoted to supervision. On the other hand, Ms. DiFranco has not had employees to supervise on a consistent basis. The Environmental Specialist II she currently supervises has been "on loan" from another DEP program, and may well be returned to that program in January, 2005.

Mr. Halliwell supervised a full-time Biologist I for about three years after his hire, performing many of the same supervisory functions as Ms. DiFranco. However, this position was lost about two years ago and, since that time, Mr. Halliwell has not directly supervised any state employees. He has, however, had a unique supervisory relationship with employees of a non-profit organization that is the recipient of federal funds to improve water quality in Maine lakes. The three employees of this non-profit are, in fact, supervised by Mr. Halliwell as he assigns, oversees, and reviews their work. He established the performance standards for the work of these employees. He has secured some equipment for them to use in their work. Because these employees are employed by the non-profit organization, Mr. Halliwell does not perform some supervisory functions as described in § 979-E(1) (adjusting grievances, taking corrective measures and, to some extent, scheduling). On the other hand,

Mr. Halliwell clearly has a supervisory relationship with these non-profit employees because they perform the "front line" work of Mr. Halliwell's water restoration project. Most importantly, Mr. Halliwell's own performance is judged by the work that he does overseeing the work of these employees, and by his interaction with the non-profit organization that employs them.

While both Ms. DiFranco and Mr. Halliwell perform many of the supervisory functions described in § 979-E(1), the issue remains whether these are the "principal functions" of their respective positions. The Board and hearing examiners have frequently interpreted this same provision as it appears in the MPELRL, at § 966(1).<sup>4</sup> A review of this precedent supports the conclusion that determining whether the principal functions of a position are supervisory is not a formulaic one based on, e.g., simply the amount of time spent supervising. As this hearing

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<sup>4</sup>The hearing examiner has not found any Board precedent interpreting § 979-E(1) since the initial creation of the state bargaining units. It would appear that most decisions regarding state bargaining unit placement (movement of classifications between bargaining units, placement of new classifications in a bargaining unit) have been done by agreement. Unfortunately, there is no Board precedent interpreting § 966(1) as it relates to whether a supervisory employee should be placed in a *large, well-established supervisory bargaining unit* as is the issue here. Many of the cases interpreting § 966(1) relate to whether one or two supervisors should be placed in the same bargaining unit as the employees they supervise. So strong is the Board's policy against the proliferation of small bargaining units, that some employees with significant supervisory duties have been placed in the same bargaining unit as their subordinate employees. See e.g., MSAD No. 14 and East Grand Teachers Ass'n, No. 83-A-09 (Aug. 24, 1983)(including principal in unit of certified teachers); Lubec Education Ass'n and MSAD No. 19 Board of Directors, No. 83-UD-17 (Apr. 13, 1983)(including head bus driver with significant supervisory duties in unit with educational support staff). These cases should be contrasted with Town of Kennebunk and Teamsters Local Union No. 48, No. 83-A-01 (MLRB Oct. 4, 1982) where the Board upheld the creation of a separate supervisory unit of police lieutenants and corporals who exercised relatively minimal supervisory duties, as the union petitioned for a separate unit. Clearly, the meaning of "principal function" has been fluid, particularly in cases where the collective bargaining rights of supervisory employees is preserved by the availability of a separate bargaining unit.

examiner has said in Rockport Police Officers Association and Town of Rockport, No. 02-UD-05 (MLRB June 12, 2002), a case determining whether a patrol sergeant should be included in a bargaining unit with patrol officers:

This hearing examiner does not believe that the time spent on supervisory tasks can be the sole gauge of whether supervisory tasks are the principal function of a position; for example, if the fact that the patrol sergeant writes the patrolmen's yearly evaluations can generate the sort of conflict that should require his exclusion from the bargaining unit, it makes little difference that he only spends four hours per year writing those evaluations. On the other hand, the more time a supervisor spends actively assigning and overseeing work of subordinates, the more likely it is that conflict may arise.

Rockport Police Officers Association, at 12, and cases cited therein. The primary function analysis is a determination based on considering a variety of factors, such as the number of persons supervised, the amount of time spent supervising, and the types of supervisory functions performed, always with the Board's instruction in mind that the purpose of creating separate supervisory bargaining units is to minimize potential conflicts of interest between supervisors and subordinates and to lessen conflicts of loyalty for supervisors between duty to their employer and allegiance to other bargaining unit employees. Penobscot Valley Hospital and Maine Federation of Nurses and Health Care Professionals, No. 85-A-01, at 8 (MLRB Feb. 6, 1985). Further, the decision is relegated to the sound discretion of the hearing examiner. MSAD No. 14 and East Grand Teachers Association, No. 83-A-09, at 12 (MLRB Aug. 24, 1983).

Applying this conclusion to the present matter, the hearing examiner finds that supervisory functions are the "principal functions" of the positions of both Ms. DiFranco and Mr. Halliwell. While neither employee supervises a large number of employees, the amount of time that they spend supervising is

significant at times during the year. Even more importantly, the supervisory duties that they perform are of a significant nature (hiring employees, establishing performance standards, scheduling, overseeing work, etc.), setting them apart from the employees whom they supervise. They are not merely "working foremen" who have minimal supervisory functions and who spend most of the work day performing the same tasks as subordinate employees. See, e.g., Richmond Employees Ass'n and Town of Richmond, No. 94-UD-09 (MLRB Apr. 26, 1994)(highway foreman who performs duties similar to subordinates during majority of his day may be placed in same bargaining unit as subordinates); Teamsters Local Union No. 48 and Town of Pittsfield, No. 81-UD-09 (MLRB Jan. 15, 1981)(sergeant whose supervisory duties were limited and who spent the majority of time performing regular patrol work may be placed in patrol bargaining unit). Further, both employees credibly testified that their "allegiance" lies more with other supervisors (and, to an extent, with management), and that their interests in bargaining matters align them with other supervisors. The original report creating the state bargaining units in 1976 emphasized the importance of the commonality of interest in determining which classifications should be placed in which units. The hearing examiner knows of no reason why this is any less true today.

While the hearing examiner has found that the principal functions of the two positions at issue here are supervisory, making this decision was a "close call." This is particularly true of Mr. Halliwell, as the employees over whom he acts as supervisor are not employed by the state. However, two final factors uniquely present here give additional support to the conclusion that these positions should be moved to the Supervisory Unit. First, 29 of the 31 Biologist II positions have already been moved to the Supervisory Unit by agreement of the parties. Most of the Biologist II's who were moved completed

the supervisory status surveys and reported that they each supervise a relatively small number of employees. The majority of Biologist II's reported that they supervised one, two, or three employees; only a few reported supervising four or five employees. At least seven Biologist II's reported supervising no more than one employee, sometimes a seasonal employee, project employee, or contractor. The Biologist II's further reported a varying degree of supervisory responsibility. The surveys therefore showed that, at least amongst this group of employees now in the Supervisory Unit, the number of employees supervised or the permanent status of those employees is not always essential in determining their supervisory status or best bargaining unit placement. Ms. DiFranco and Mr. Halliwell do not fall outside the norm set by the other positions in this classification. If these 29 employees share a community of interest with the employees in the Supervisory Unit, so do Ms. DiFranco and Mr. Halliwell.

Second, the parties agreed that classifications in state government are almost never split between bargaining units and that no classification is currently split. When the state bargaining units were created, only one classification was split - custodians, who were placed in the Institutional Services Unit if their job required patient contact and care, or who were placed in the Operations Maintenance Unit if their job did not require this. The executive director was clearly reluctant to split even this one classification, finding that it was desirable to "prevent fragmentation of job titles" and to give employees a fair description of the functions performed by any given classification. Council No. 74, AFSCME and Office of State Employee Relations, supra, No. 75-UD-04, at 12. In one of the appeals taken from the original report, the Board concurred that the policies underlying public sector collective bargaining were best served by *not* splitting classifications between units. Interlocutory Decision

of Appellate Proceedings, No. 77-A-02, at 3 (MLRB Feb. 2, 1977).

The Board later reaffirmed its position in a case involving a petition to separate corrections employees from the Institutional Services Unit. In affirming the denial of the petition, the Board stated:

Under the unit formula adopted at [the time that the state bargaining units were created], no specific job classification is found in more than one State employee bargaining unit. Local 48's severance request, if successful, would result in five particular classifications being included in two separate bargaining units. Such a consequence would undermine the rationale for the separation of State employee bargaining units and could have a significant impact on all such units in the future.

Teamsters and State Institutional Services Unit, et al.,

No. 84-A-02, at 4 (MLRB Apr. 2, 1984). The reasons for keeping an entire classification in one bargaining unit are numerous.

It serves to put employees on notice of the bargaining unit placement of their classification and, thus, the terms and conditions of their employment as described in the unit's collective bargaining agreement. It allows the employees to identify and align themselves with other employees in their unit, particularly for purposes of negotiating and enforcing the collective bargaining agreement. It is also, presumably, easier for the employer to administer. Under the unique circumstances of this case (when the vast majority of positions in the Biologist II classification have been moved to a new bargaining unit), the remaining two positions held by Ms. DiFranco and Mr. Halliwell should likewise be moved.

#### CONCLUSION

The Union's petition for unit clarification is granted. The classification of Biologist II, including the positions currently held by incumbents Jeanne DiFranco and David Halliwell, shall be

moved from the Professional and Technical Services Bargaining Unit to the Supervisory Services Bargaining Unit. This change shall be effective as of the date of this decision, except for the positions of those incumbents already moved by agreement of the parties, as reflected in the two Agreement on Appropriate Bargaining Unit forms filed with the Board on February 3, 2004, and July 14, 2004.

Dated at Augusta, Maine, this 24th day of September, 2004.

MAINE LABOR RELATIONS BOARD

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Dyan M. Dyttmer  
Hearing Examiner

The parties are hereby advised of their right, pursuant to 26 M.R.S.A. § 979-G(2), 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.