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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 Clerk IV classification, currently included in the State Employee Administrative Services Bargaining Unit ("Administrative 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.¹ In the months following the filing of the petition, the parties and Board staff

¹The Union simultaneously filed a second petition relating to the Biologist II positions, Case No. 04-UC-01. A separate hearing was conducted in that matter and a decision issued on September 24, 2004. In neither case did the employer file 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.

participated in several pre-hearing conferences in an attempt to determine whether the parties could agree to the movement of some of the Clerk IV positions from the Administrative Unit to the Supervisory Unit. To this end, the parties crafted a survey to be sent to all employees holding the Clerk IV position to help determine their supervisory status. The surveys were sent to all employees holding the Clerk IV position on October 7, 2003, by Board staff. Board staff handled and compiled the surveys that were returned.

During the course of these proceedings, the number of Clerk IV positions in state government fluctuated, but generally remained between 120 to 130 (with certain positions vacant at times). On February 3, 2004, the parties submitted an Agreement on Appropriate Bargaining Unit that moved the positions of 71 Clerk IVs from the Administrative Unit to the Supervisory Unit. In some cases, all of the Clerk IVs employed in a department were moved (such as in the Department of Administrative and Financial Services, and the Department of the Secretary of State); in other cases, some of the Clerk IVs employed in a department were moved, and other remained in the Administrative Unit (such as in the Department of Health and Human Services). On September 1 and October 5, 2004, the parties submitted a second and third agreement that moved the positions of two more Clerk IVs from the Administrative Unit to the Supervisory Unit. On March 2, 2005, the parties submitted a fourth agreement that moved the positions of three more Clerk IVs from the Administrative Unit to the Supervisory Unit. On May 31, 2005, the parties submitted a fifth agreement that moved the position of one more Clerk IV from the Administrative Unit to the Supervisory Unit. The parties effectively agreed that the Clerk IV position would be "split" between the Administrative Unit and the Supervisory Unit (although this would be the only position so split in state government), depending on the duties of the particular position.

On December 15, 2004, counsel for MSEA filed a Motion to Amend Petition which sought to move only certain Clerk IVs remaining in dispute from the Administrative Unit to the Supervisory Unit. This motion was orally amended by counsel for MSEA during the hearing conducted on March 2, 2005. Counsel for the State had no objection to the Motion to Amend Petition, and the motion was granted. As a result of this motion, the parties agreed that the hearing examiner should determine only whether seven Clerk IVs still in dispute should be moved to the Supervisory Unit: one Clerk IV in the Department of Education, and six Clerk IVs in the Department of Health and Human Services.

After due notice, a series of evidentiary hearings was held by the undersigned hearing examiner on the petition on August 25, 2004, September 1, 2004, and March 2, 2005. Mr. Belcher appeared on behalf of the MSEA. Joyce A. Oreskovich, Esq., appeared on behalf of the State. The union presented as its witnesses: John Graham, MSEA Director of Field Services; and Brenda Beaulieu, Geraldine Connolly, Sandra Goldman, Diane McDonald, Ann Marie Stevens, and Wanda Gay, all Clerk IVs. The State presented as its sole witness Stephen Smith, Personnel Officer for the Department of Health and Human Services. The parties also agreed that regarding three of the positions (currently held by Lisa Robbins, Elaine White, and Tina White), the hearing examiner should base her decision on the written survey submitted (Union-15, Union-16, and Union-17). At the hearings, the parties were given the opportunity to examine and cross-examine witnesses, offer evidence and present argument. The parties agreed to waive closing arguments.

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 seven positions still at issue in this matter.

EXHIBITS

The following exhibits were offered into evidence without objection:

<u>Exhibit No.</u>	<u>Title/Description</u>
Union-1	Job Description form (Beaulieu)
Union-2	Clerk IV interview questions (Beaulieu)
Union-3	Outline of job assignments (Beaulieu)
Union-4	Line list by region
Union-5	Interview Questions (McDonald)
Union-6	Performance Evaluation 8/03 (McDonald)
Union-7	Performance Evaluation 8/04 (McDonald)
Union-8	Performance Evaluation 11/03 (Stevens)
Union-9	Correspondence (Belcher-Oreskovich) re: Clerk IV reclassification
Union-10	Form 1 dated 2/3/04
Union-11	Form 1 dated 9/1/04 (Johnson)

Union-12	Survey of Wanda Gay
Union-13	Clerk IV job description (Gay)
Union-14	Performance Evaluation 5/04 (Gay)
Union-15	Survey of Tina White
Union-16	Survey of Elaine White
Union-17	Survey of Lisa Robbins
Union-18	Survey of Brenda Beaulieu
Union-19	Survey of Geraldine Connolly
Union-20	Survey of Ann Marie Stevens
Joint-1	Administrative Services collective bargaining agreement, 2003-2005
Joint-2	Supervisory Services collective bargaining agreement, 2003-2005
Joint-3	Form 1 dated 2/3/04

FINDINGS OF FACT

Findings regarding Brenda Beaulieu

1. Brenda Beaulieu has been employed by the Department of Education ("DOE") for over 17 years. For the last three years, she has held the position of Office Manager/Clerk IV in the Division of Compensatory Education in the DOE. Her job classification is Clerk IV, but her position is commonly called an Office Manager position within the Division.

2. The Division of Compensatory Education administers federal Title IA and IC funds for various recipient school districts in the state. The Division is headed by a Title IA Director. Other employees in the Division include a Title IC Director (a contract employee), two school consultants, a distinguished educator, a Data Entry Supervisor, a Data Control

Specialist, and two Clerk-Typist IIs.

3. Ms. Beaulieu's direct supervisor is the Division Director.

4. Ms. Beaulieu is the direct supervisor of the two Clerk-Typist IIs in the Division. She writes and signs the yearly evaluations for these two employees. She assigns them work and oversees their work. She is held accountable, as their supervisor, for the work that they perform. She approves their time off and their time sheets. She applies the office policies. She handles complaints or grievances they might have about the workplace. For instance, one of the employees complained to her about being treated rudely by a consultant working for the Division. Ms. Beaulieu handled this situation by asking the consultant to give work assignments to Ms. Beaulieu, who then distributed the work assignments.

5. To some extent, Ms. Beaulieu also acts as a supervisor to the Data Entry Supervisor and the Data Control Specialist. In 2004, the Data Entry Supervisor received a reclassification of her position to that supervisory position. The Data Entry Supervisor was then in a pay grade above Ms. Beaulieu, and Ms. Beaulieu did not believe that it was any longer appropriate to perform work evaluations on the Data Entry Supervisor or the Data Control Specialist. After the reclassification, the Division Director performs the evaluations for these two positions. The Division Director still consults with Ms. Beaulieu about these evaluations.

6. Ms. Beaulieu still assigns some work and directs the work flow of the Data Entry Supervisor and the Data Control Specialist. She also approves their time off.

7. The job description for Ms. Beaulieu's job (Union-1) provides, in part, as follows:

This is a clerical office management and supervisory position within the Office of Compensatory Education.

The employee is responsible for overseeing the work of support staff and data entry staff to ensure timely processing of information, professional looking documents, and that work practices comply with state policies and procedures.

One of the functions of the job is described as "Interviews, selects/recommends, trains, supervises and evaluates clerical/data processing staff."

8. Ms. Beaulieu's job requires her to perform a variety of non-supervisory functions as well, such as overseeing projects, developing contracts, dealing with consultants, and processing bills. She does not perform work similar to those employees whom she supervises.

9. Ms. Beaulieu estimates that she spends ten to fifteen percent of her time directly supervising employees (evaluating employees, assigning work, etc.)(Union-18).

Findings regarding Geraldine Connolly

10. Geraldine Connolly has been employed by the State of Maine for 18 years. For the past seven years, she has been employed as an Office Manager/Clerk IV. She was employed by the Department of Mental Health and Retardation but, following the merger of this Department with the Department of Human Services, she is now employed by the newly-named Department of Health and Human Services (DHHS). She is employed in the Region I office in Portland, an office which provides services in York and Cumberland counties.

11. Ms. Connolly's director supervisor is the program supervisor.

12. Three team leaders are employed in Region 1, covering mental health services, mental retardation services, and children's services. These team leaders supervise case work supervisors who, in turn, supervise caseworkers. Ms. Connolly's job entails overseeing the day-to-day functioning of the Region 1

office, supervising some support staff employees, and distributing work to the support staff employees from the three team leaders and from the assistant regional director.

13. Ms. Connolly is the direct supervisor of two state employees--a Clerk-Typist II and a Clerk-Typist III. These two employees provide reception coverage for the office, as well as typing, filing and other support services. Ms. Connolly was part of the interview team (along with the assistant regional director and the administrative secretary) that selected these two employees for hire. She trained these employees. Ms. Connolly writes and signs the yearly evaluations for these two employees. She assigns them work and oversees their work. She is held accountable, as their supervisor, for the work that they perform. She approves their time off and signs their time sheets. She calls and conducts staff meetings which involve these, and other office staff. She performs ergonomic evaluations for some staff.

14. Ms. Connolly is also the direct supervisor of other support staff employees hired on a temporary basis. These employees might be obtained from temporary agencies, non-profit agencies, or the ASPIRE program. These employees also function as clerk-typists. As of August, 2004, Ms. Connolly supervised one full-time and one part-time temporary employee. Regarding these employees, she assigns them work and oversees their work. She signs their time sheets. She completes evaluations regarding their work, although she is not required to because they are not state employees. The office has employed such temporary staff on a fairly consistent basis for the last four years.

15. Ms. Connolly is responsible to administer first-level discipline, such as counseling and oral reprimand. She made the decision to extend a probation of, then ultimately to discharge, one state employee whom she supervised. She also made the decision to discharge one temporary employee whom she supervised.

16. Ms. Connolly has participated in meetings with other

supervisors and administrators to develop office policies and protocol. It is part of her job to enforce office policies. She suggested and implemented installing a bulletproof window in the reception area of the office.

17. Ms. Connolly's job requires her to perform a variety of non-supervisory functions as well, such as handling the archiving of files, overseeing the physical maintenance of the office, and monitoring the office budget. She usually does not perform work similar to those employees whom she supervises, unless the office is short-staffed due to vacations or other leave.

18. Ms. Connolly estimates that she spends twenty-five percent or more of her time directly supervising employees. She performs as a supervisor every day, although the amount of time she spends each day may vary (Union-19).

19. Ms. Connolly has attended two training opportunities which focused on supervisory skills.

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

Findings regarding Ann Marie Stevens

21. Ann Marie Stevens has been employed by DHHS, in the Bureau of Elder and Adult Services, for over eight years as a Clerk IV. Ms. Stevens is supervised by the Director of the Community Resource Development Unit who is, in turn, supervised by the Bureau Director.

22. Ms. Stevens is the direct supervisor of four Clerk-Typist IIIs in the Unit who perform a variety of work. One of the Clerk-Typist IIIs maintains a data base and performs all support work for the Adult Protective Service Program. One of the Clerk-Typist IIIs performs support work for program managers in the office (scheduling, paying bills, answering telephones, etc.). These two Clerk-Typist IIIs have been under Ms. Steven's

supervision throughout Ms. Steven's employment as a Clerk IV. The other two Clerk-Typist IIIs came under Ms. Stevens' supervision four years ago when their function came under the direction of her Bureau. These two Clerk-Typist IIIs handle all the paperwork and other support work related to licensing adult assisted care facilities.

23. In addition to her duties as supervisor, Ms. Stevens also performs support work (scheduling, typing, etc.) for her immediate supervisor and for the Bureau Director.

24. Ms. Stevens writes and signs the yearly performance evaluations for the four Clerk-Typist IIIs. She assigns them work and oversees their work. She handles complaints or grievances they might have about the workplace. She applies office policies. She handles any initial discipline required, such as verbal counseling. Ms. Stevens is held accountable, as a supervisor, for the work performed by the employees whom she supervises.

25. Ms. Stevens interviewed and hired one of the four employees whom she supervises. She also trained this employee. The other three employees were in their respective positions when Ms. Stevens became their supervisor.

26. The concise description of Ms. Stevens' job, as contained in her performance evaluation (Union-8), is as follows:

Position supervises four Clerk Typist III's, and is responsible for day-to-day activities involved with managing the Bureau's central office and the Assisted Living office. Responsibilities include hiring, making work assignments, anticipating needs of professional staff and making accommodations in work flow, ensuring the unit present a good public image, responding to public inquiries, maintaining Bureau records and supplies, and in general being familiar with the Bureau's programs and services.

Much of this performance evaluation describes expectations, competencies, and skills required for this position which relate

to supervising other employees.

27. Ms. Stevens does not normally perform work similar to the employees whom she supervises, but does do so on occasion when help is needed or employees are on vacation.

28. Ms. Stevens estimates that she spends 40 percent or more of her time directly supervising employees (Union-20).

29. Ms. Stevens has attended several training opportunities which focused on supervisory skills and knowledge needed by supervisors, since she began in her current position.

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

Findings regarding Wanda Gay

31. Wanda Gay has been employed by the State for over 24 years. For the last four years she has been employed as a Clerk IV by DHHS, Bureau of Income Maintenance. The primary job of Ms. Gay's office is to set up and process electronic accounts for recipients of food stamps and cash benefits (TANF) based upon applications and information gathered at 16 area offices in Maine. The office will also be setting up and processing cards for the Dirigo Health Program.

32. Besides Ms. Gay, the office is currently staffed by a Project Manager, one Clerk-Typist II, one Clerk-Typist I, and one Store Clerk. The office has had higher staffing levels in the past but, due to frozen positions, is currently at the present level.

33. The work of the office changed considerably two years ago when the food stamp/cash benefit system went from a "paper" system (with food stamp coupons and checks) to an electronic transfer system. Now recipients are issued a plastic card, like a credit card, to access their food stamps and cash benefits. Prior to this change to an electronic system, the office

supervisor was re-classified to a Project Manager. His job as Project Manager takes him outside the office a great deal, meeting with vendors, banks, retailers, and other groups. After he became a Project Manager, Ms. Gay's position was required to handle even more of the day-to-day supervision of the office.

34. Due to the change to the electronic system, the duties performed by the support staff also changed considerably. Ms. Gay had to formulate new job assignments. Under this new system, the Clerk-Typist II enters data from the regional offices, the Clerk-Typist I handles phone, mail, and certain form letters, and the Store Clerk runs the machine that produces the electronic cards and does mail. Because the office is understaffed, Ms. Gay prioritizes the work done by the three staff employees and, as needed, does some of the overflow work herself.

35. As the immediate supervisor of the three staff employees, Ms. Gay assigns and oversees their work and answers their questions. She is held accountable for the work that they perform. She approves their time off. She handles at an initial level complaints or grievances that they might have about the workplace. She applies office policies.

36. Ms. Gay is responsible to administer first-level discipline, such as counseling and oral reprimand. She has, for instance, counseled an employee about unprofessional conduct and worked to "keep the peace" between two employees who sometimes do not get along in the workplace.

37. The job description for Ms. Gay's job (Union-13) contains the following supervisory duties:

Plans and organizes this units work. Delegates and distributes the assignments to the office staff. Follows up with staff to insure the work has been done timely and correctly . . . Establish work methods and procedures in order to meet Federal Food Stamp

guidelines. Establish work methods and procedures to insure that we are in balance with the contractor, our accounting system as well as the Federal Reserve Bank . . . Interviews and makes recommendations on staff that are to be hired. Trains staff and responds to employee complaints as well as to complaints about employees. When necessary meets with employees to counsel and alter the offending behavior.

38. Ms. Gay's job requires her to perform a variety of non-supervisory tasks as well, such as completing federal reports, responding to auditors, and purchasing office equipment and supplies. Except for performing overflow work as described above, Ms. Gay does not perform work similar to that performed by the employees whom she supervises.

39. The Project Manager, not Ms. Gay, writes and signs the yearly evaluations for the three support staff employees. As Ms. Gay is more responsible for their day-to-day supervision, the Project Manager consults with Ms. Gay prior to writing the evaluations.

40. Ms. Gay estimates that she spends twenty percent or more of her time directly supervising employees. She performs as a supervisor every day, although the amount of time she spends each day may vary, and may also depend on whether or not the Project Manager is working in the office.

41. In 2003, Ms. Gay attended a two-day training called Managing in State Government.

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

Findings regarding Tina White (based on survey)

43. Tina White has been employed by the State for over 15 years. For about the last year, she has held the position of Clerk IV in the DHHS, Bureau of Medical Services, Provider File and Inquiry Unit.

44. Ms. White's job entails supervising approximately 10 permanent employees and four project employees in the two different units: (permanent) five Clerk IIIs, one Clerk II, one Clerk-Typist III, one Medical Claims Evaluator, and two Senior Medical Claims Evaluators, (project) three Clerk IIs and one Clerk III.

45. Ms. White is the direct supervisor of these ten permanent and four project positions. She writes and signs the yearly evaluations for these employees. She assigns them work and oversees their work. She is held accountable, as their supervisor, for the work that they perform. She establishes and applies office policies.

46. Ms. White handles initial level complaints or grievances that any of these employees might have about the workplace. She is also responsible to enforce the collective bargaining agreement and to take initial corrective action, as needed.

47. Ms. White's job requires her to perform other non-supervisory functions as well, such as being the "subject matter expert" for all employees in her building with questions about the provider sub-system. She spends up to one to two hours per day performing work that is similar to that performed by the employees whom she supervises.

48. Ms. White spends the majority of her time each day acting as a supervisor and dealing with issues related to her role as a supervisor.

49. Ms. White has attended several training opportunities related to supervisory skills, including Managing in State Government.

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

Findings regarding Elaine White (based on survey)

51. Elaine White has been employed by the State for over 29 years. For about 18 years, she has held the position of Clerk IV in the DHHS, Bureau of Child and Family Services. Her job classification is Clerk IV, but her position is commonly called the Secretary to the Bureau Director.

52. Elaine White's job entails supervising three employees, two Clerk-Typist IIs and one Secretary.

53. Elaine White is the direct supervisor of these three employees. She writes and signs the yearly evaluations for these employees. She assigns them work and oversees their work. She is held accountable, as their supervisor, for the work that they perform. She establishes and applies office policies.

54. Elaine White handles initial level complaints or grievances that any of these employees might have about the workplace. She is also responsible to enforce the collective bargaining agreement and to take initial corrective action, as needed. For instance, she has counseled an employee about a sexual harassment complaint and about the misuse of state equipment.

55. Elaine White's job requires her to perform other non-supervisory functions as well, such as being the liaison to the Commissioner's and the Director's office for constituent complaints, and coordinating travel plans for Bureau caseworkers. She spends some time on the support staff team performing work that is similar to that performed by the employees whom she supervises.

56. Elaine White estimates that she spends twenty-five percent or more of her time directly supervising employees.

57. Elaine White has attended several training opportunities related to supervisory skills, including Managing in State Government, Performance Management, and Employee Interview and Selection.

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

Findings regarding Lisa Robbins (based on survey)

59. Lisa Robbins has been employed by the State for over 18 years. For about one year, she has held the position of Clerk IV in the DHHS, Bureau of Health, Health and Environmental Testing Laboratory. Her job classification is Clerk IV, but her position is commonly called the Office Manager.

60. Lisa Robbins' job entails, in part, supervising two employees: one Account Technician and one Clerk-Typist III. Three other positions are also generally under the supervision of Ms. Robbins: two Clerk-Typist IIs and one Data Entry Specialist. Ms. Robbins has delegated the day-to-day review oversight of these positions to the Account Technician and to the Clerk-Typist III. However, in the absence of these employees, she directly oversees the work of these three employees as well.

61. Ms. Robbins is the direct supervisor of the two employees, and also retains supervisory authority over the other three employees, as described above. Regarding the Account Technician and the Clerk-Typist III, Ms. Robbins writes and signs the yearly evaluations for these employees. She assigns them work and reviews projects as requests. She is held accountable, as their supervisor, for the work that they perform. She oversees the work of all five employees.

62. Ms. Robbins establishes performance standards for the office, applies personnel policies or procedures, and enforces the collective bargaining agreement, as necessary. She is empowered to take corrective action to enforce performance standards. She has spoken generally to employees about performance issues such as overtime and reporting, though she has not been required to counsel or to take any corrective actions

regarding the employees whom she supervises.

63. Ms. Robbins' job requires her to perform other non-supervisory functions as well, such as purchasing chemicals and equipment, creating and reviewing contracts, preparing budgets, and overseeing collection of revenue. She spends a limited amount of time performing clerical work similar to that performed by the employees whom she supervises.

64. Ms. Robbins estimates that she spends fifteen percent or more of her time dealing with supervisory and personnel issues, and payroll.

65. Ms. White has attended several training opportunities related to supervisory skills, including Managing in State Government and Implementing Supervisory Practices.

66. Due to her job responsibilities, Ms. White views herself as a supervisor.

DISCUSSION

The parties stipulated that the various threshold requirements for a unit clarification petition, as 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 seven Clerk IV positions still in dispute between the parties should be moved from the Administrative Unit to the Supervisory Unit, joining the approximately 75 Clerk IV positions that have been moved to the Supervisory Unit by the agreement of the parties. As the parties have been unable to agree whether these seven positions should remain in the Administrative 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 seven 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. Section 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 Board has explained the purpose of the requirement that positions in a bargaining unit share a community of interest, examining identical language in the Municipal Public Employees Labor Relations Law (MPELRL):

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). The Board Rules further elaborate the factors to be considered in determining whether employees share

the requisite community of interest.²

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). In the present matter, however, the state employee bargaining units at issue have existed for almost 30 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;

²The 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.

job classifications were not "split" based on specific job duties.³

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 these classifications shared a community of interest for purposes of collective bargaining. In creating the Administrative Unit (which included the Clerk IV position from the outset), the executive director stated that:

Employees in this unit generally perform their duties in an office environment and their work product may generally be described as a service, as opposed to the production of product(s). Employees in this unit are commonly referred to as "white collar" workers who work with and near light office equipment during a standardized work week. Their career ladders, promotions and transfers are almost exclusively within this unit and they have unique interests regarding their working conditions, i.e., parking facilities, dress codes, inclement weather policy, policies concerning advancement, training and promotion, equipment replacement, cafeteria service or its proximity, and vacation schedule. There is also concern for the basic considerations of pay, retirement, and personnel rules.

These employees generally work inside and with other employees or members of the public who share interrelated work areas, functions, and/or concerns. Employees in this unit are seldom, if ever, subject to emergency call back or standby requirements or shift work. These employees are seldom, if ever, required to supply any of the tools of their profession as these items are generally part of the office environment provided by the employer. Most of these employees have private training and/or experience which qualify them for their jobs and give them relatively high potential

³The 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.

for transfers and promotions to other generic groupings or job titles within the bargaining unit.

In creating the Supervisory 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.

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 Administrative 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 conundrum that this case presents. 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 bargaining units at issue actually share. A review of the Supervisory Unit collective bargaining agreement, for instance, shows an extremely

diverse group of classifications in that unit.⁴ The classifications in the Supervisory Unit supervise employees in all of the other bargaining units. Since these supervisory classifications are so dissimilar in terms of training, experience, pay, supervision, and other "community of interest" factors, the hearing examiner can conclude only the obvious: that the primary factor uniting the interests of these classifications is simply that they are supervisors. While all are "supervisors," the nature and extent of supervisory duties performed by each classification presently in the Supervisory Unit undoubtedly varies.

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 M.R.S.A. § 966(1), usually in determining whether supervisory employees may be placed in the same bargaining unit

⁴Including, 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.

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).

All seven of the Clerk IVs at issue here perform supervisory duties as outlined in § 979-E(1). Without repeating the findings of fact here, all seven perform the usual functions of a supervisor--they schedule, assign work, and oversee and review work of subordinate employees. All seven perform a significant amount of work that is distinct and dissimilar from the employees whom they supervise, except to occasionally "fill in" for absent employees. Regarding this criterion, none of the seven employees is merely a "working foreman," or an employee who essentially performs the same work as their subordinates, with only limited

and undemanding oversight duties additionally required.⁵ Rather, each of these employees is required to perform significant and separate supervisory duties as part of their position. All seven employees are empowered to adjust grievances and to take corrective measures to implement performance standards, and to exercise judgment in these matters. All seven apply established personnel policies and enforce the collective bargaining agreement, where appropriate.

The issue remains whether these supervisory duties are the "principal functions" of the seven positions, per § 979-E(1). In MSEA and State of Maine, No. 04-UC-01 (Sept. 24, 2004), a recent decision rendered in a companion petition relating to the Biologist II positions being moved from the Professional and Technical Bargaining Unit to the Supervisory Unit, this hearing examiner addressed the same issue. In that case, however, the parties had agreed to move all the Biologist II positions to the Supervisory Unit except for two positions. This hearing examiner found that the issue whether supervisory duties were the "principal functions" of these remaining two positions was a "close call," but that the decision to move the two positions was further supported by having the entire Biologist II classification in one bargaining unit. MSEA and State of Maine, at 20-22. That is not the case here because, as a result of the parties' agreement, the Clerk IV classification will be split between bargaining units. The only issue here is whether the seven employees belong with the "supervisory" Clerk IVs rather

⁵Such "working foremen" may be included in a bargaining unit with the employees whom they supervise, without risk of significant conflict of interest. See e.g., Richmond Employees Ass'n and Town of Richmond, No. 94-UD-09, at 31 (MLRB Apr. 26, 1994)(highway foreman performs duties similar to subordinates during majority of his workday); Teamsters Local No. 48 and Van Buren Light and Power District, No. 85-UD-14, at 8-9 (MLRB Jan. 25, 1985)(line foreman's job content not distinct and dissimilar for the substantial portion of his working hours).

than the "non-supervisory" Clerk IVs.

Other than the Biologist II decision, the hearing examiner can find no precedent (hearing examiner or Board) interpreting § 979-E(1) since the initial creation of the state bargaining units. This is significant because the Board precedent interpreting § 966(1)--the parallel provision of the MPELRL--usually involved facts very different from the present matter. Specifically, many of the cases interpreting § 966(1) involved whether one or two supervisors should be placed in the same bargaining unit as the employees they supervise. Sometimes, employees with even significant supervisory duties were placed in the same bargaining units as their subordinate employees pursuant to the Board's policy against the proliferation of small bargaining units. See, e.g., MSAD No. 14 and East Grand Teachers Ass'n, No. 83-A-09 (MLRB 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 (MLRB Apr. 13, 1983) (including head bus driver with significant supervisory duties in unit with educational support staff). On the other hand, the Board has upheld the creation of a separate supervisory police unit, even though the employees exercised relatively minimal supervisory authority, when the union petitioned for a separate unit. Town of Kennebunk and Teamsters Local Union No. 48, No. 83-A-01 (MLRB Oct. 4, 1982). In sum, much of the Board precedent interpreting the "supervisory" language of the statute, including whether the "principal functions" of the position include supervisory duties, is inapposite to the issue presented here: whether a position should be moved from a large, well-established non-supervisory bargaining unit into a large, well-established supervisory bargaining unit.

This hearing examiner believes that particularly here, when a well-established supervisory unit exists, the "principal functions" analysis should include a wide variety of factors,

including but not limited to: the number of employees supervised, the status of those employees (permanent, temporary, year-round, etc.), the amount of time spent supervising, and the types of supervisory functions performed. As stated in a recent decision, Rockport Police Officers Association and Town of Rockport, No. 02-UD-05 (MLRB June 12, 2002), involving whether to include a patrol sergeant in a 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. These factors must all be weighed 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, supra.

Considering all of these factors, the hearing examiner concludes that the "principal functions" of all seven Clerk IV positions at issue here are characterized by performing the type of supervisory functions as described in § 979-E(1). The number of employees that each of these Clerk IVs supervise varies, but even the Clerk IVs who supervise the fewest number of permanent, full-time employees (two) also effectively supervise other

employees.⁶ The amount of time each spends supervising also varies, but all the Clerk IVs who testified agreed that calculating such a figure is extremely difficult. At times, all seven of the Clerk IVs spend significant amounts of time performing day-to-day supervisory duties, such as scheduling and assigning work, overseeing and evaluating work, enforcing office policies and procedures, interviewing and hiring as necessary, handling concerns and grievances, and taking disciplinary action. All seven of the Clerk IVs interview and hire for positions as needed. The performance of these supervisory duties has the potential to place the seven Clerk IVs in conflict with the employees whom they supervise, supporting the conclusion that they should be placed in the existing Supervisory Unit. Finally, most of the Clerk IVs in question testified (or responded in their survey) that they are identified as a supervisor and that their collective bargaining interests are more similar to the interests of employees in the Supervisory Unit. Placing them in the Supervisory Unit can act to lessen any conflict of interest these employees experience between allegiance to the employer/management and allegiance to other bargaining unit members.

For these reasons, the hearing examiner finds that the seven Clerk IVs remaining at issue in this matter perform the type of supervisory duties as defined in § 979-E(1) and share a community of interest with other supervisory employees currently in the Supervisory Unit. They should be moved from the Administrative Unit to the Supervisory Unit.

CONCLUSION

The Union's July 1, 2003, Petition for Unit Clarification, as amended on March 2, 2005, is granted. The seven Clerk IV

⁶For instance, Ms. Beaulieu supervises two positions, but also exerts extensive supervisory authority over two additional positions.

positions still at issue (positions currently held by Brenda Beaulieu, Geraldine Connolly, Wanda Gay, Ann Marie Stevens, Lisa Robbins, Elaine White, and Tina White), shall be moved from the Administrative Services Bargaining Unit to the Supervisory Services Bargaining Unit. This change shall be effective as of July 1, 2003, or as of the date the employee was hired in the Clerk IV position, whichever is later. The parties may agree to a different effective date in light of facts related to the particular positions at issue.

Dated at Augusta, Maine, this 27th day of June, 2005.

MAINE LABOR RELATIONS BOARD

/s/ _____
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.