

_____	)	
TEAMSTERS UNION LOCAL 340,	)	
	)	
Petitioner,	)	
and	)	UNIT DETERMINATION
	)	REPORT
TOWN OF SOUTH BERWICK,	)	
	)	
Public Employer.	)	
_____	)	

PROCEDURAL HISTORY

This unit determination proceeding was initiated on April 1, 2010, when James E. Carson, president of Teamsters Union Local 340 ("Teamsters" or "Union"), filed a Petition for Unit Determination and Bargaining Agent Election with the Maine Labor Relations Board ("Board" or "MLRB"). This Petition requested a determination that the following employees of the Town of South Berwick ("Town" or "Employer") constituted an appropriate bargaining unit within the meaning of 26 M.R.S.A. § 966(1) and (2): Accountant/Deputy Treasurer, Deputy Tax Collector/Personnel Benefits Administrator, Town Clerk, Assessing Agent, Code Officer/Plumbing Inspector/Health Officer (hereafter referred to as the Code Enforcement Officer), Director of Planning and Economic Development, and Police Lieutenant. Linda D. McGill, Esq., filed a timely response to the petition on behalf of the Town on April 21, 2010. The Town objected to the inclusion of the following positions in the unit: Town Clerk, Code Enforcement Officer, Assessing Agent, and Police Lieutenant.

On June 3, 2010, a prehearing conference by telephone was held in this matter. Subsequent to the conference, the parties reached an agreement that the position of Police Lieutenant could be placed in the bargaining unit. After due notice, an

evidentiary hearing on the unit determination petition was held by the undersigned hearing examiner on June 10, 2010, at the Board's hearing room in Augusta, Maine. Sylvia Hebert, Teamsters Business Agent, appeared on behalf of the Union. David Burke, Chairman of the Town Council of South Berwick, appeared on behalf of the Town. The Union presented as its witnesses: Barbara Bennett, Town Clerk; Joseph Rousselle, Code Enforcement Officer; and Craig Skelton, Assessing Agent. Mr. Burke presented brief testimony on behalf of the Town. The parties were given the opportunity to examine and cross-examine witnesses and to offer evidence. The parties presented oral argument at the conclusion of the hearing.

#### 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. § 966(1) and (2). The subsequent references in this determination are all to Title 26, Maine Revised Statutes Annotated.

#### STIPULATIONS

The parties stipulated to the following facts:

1. The Teamsters Union Local 340 is a public employee organization that seeks to become the bargaining agent for the employees in the proposed bargaining unit, within the meaning of 26 M.R.S.A. § 962(2).
2. The Town of South Berwick is a public employer within the meaning of 26 M.R.S.A. § 962(7).
3. The parties agree that the following positions comprise an appropriate unit for purposes of collective bargaining: Accountant/Deputy Treasurer, Deputy Tax Collector/Personnel Benefits Administrator, Director of Planning and Economic Development, and Police Lieutenant.

4. The Employer objects to the inclusion of the Town Clerk in the bargaining unit on the basis that the Town Clerk is a "department head" within the meaning of 26 M.R.S.A. § 962(6)(D) and therefore not a public employee, as defined.
5. If the attorney examiner finds that the Town Clerk is not a "department head," then the Employer agrees that the position may be included in the bargaining unit.
6. The Employer objects to the inclusion of the Code Enforcement Officer in the bargaining unit on the basis that the Code Enforcement Officer is a "department head" within the meaning of 26 M.R.S.A. § 962(6)(D) and therefore not a public employee, as defined.
7. If the attorney examiner finds that the Code Enforcement Officer is not a "department head," then the Employer agrees that the position may be included in the bargaining unit.
8. The Employer objects to the inclusion of the Assessing Agent in the bargaining unit on the basis that the position does not share a community of interest with the other positions in the bargaining unit, on the basis that the position is shared with the Town of North Berwick.

#### EXHIBITS

The following exhibits were offered into evidence without objection:

Employer-1	Portions of Article II and III of the Town of South Berwick ordinances
Union-1	Town Clerk job description
Union-2	Barbara Bennett letter of employment, June 8, 1996
Union-3	Police Lieutenant job description
Union-4	Christopher Burbank letter of employment, September 27, 1993

Union-5            Code Enforcement Officer job description

Union-6            Joseph Rousselle letter of employment,  
July 9, 2001

Union-7            Assessing Agent job description

Union-8            Craig Skelton letter of employment,  
February 5, 2007

Union-9            Agreement between Town of South Berwick and  
Town of North Berwick regarding employment of  
Assessing Agent, September 20, 2005

FINDINGS OF FACT

1. The executive body of the Town of South Berwick is the five-person Town Council. Pursuant to the Town Charter, the Town Manager is appointed by the Town Council and serves at the will of the Council. The Town Manager is the administrative head of the Town and is responsible to the Council for the administration of all departments assigned to him.
2. The purpose of the position of Town Clerk is to " . . . provide administrative and supervisory work in the administration of federal, state and local statutes, the maintenance of official municipal records, the issuing of various licenses and documents, administration of motor vehicle registrations and renewals and the administration of fair and accurate elections" (Union Exh. No. 1).
3. The Town Clerk also serves as secretary to the Town Council.
4. The present Town Clerk, Barbara Bennett, has served in her position for 14 years. Article IV, Sec. 3-29 of the Town Ordinance provides that the Town Clerk is the head of the Department of Records.
5. The Town Clerk works on a full-time basis. She supervises two Customer Service Representatives (CSRs), both of whom work part-time (16 and 26 hours per week, respectively).

The Town Clerk and the two CSRs all perform similar "counter" work equally; that is, all three help citizens complete transactions with the Town, such as paying taxes, registering vehicles, and buying licenses.

6. The Town Clerk recommended the CSRs for hire. The Town Manager has the ultimate authority to hire and fire employees. The Town Clerk writes an annual performance evaluation for the CSRs. She has occasionally been involved in discipline of a CSR. She also sets the schedules for the CSRs.
7. The Town Clerk was hired by the Town Manager, as reflected in a letter dated June 18, 1996 (Union Exh. No. 2). In the letter, Ms. Bennett was advised that she would be sworn in before she assumed her duties, and that she would serve a six-month probationary period.
8. Sometime after Ms. Bennett was hired as the Town Clerk, the Town Council affirmed the list of municipal officials that would be serving for the coming year. The list of these officials included, amongst other positions, the Town Clerk and the Code Enforcement Officer. This "affirmation" has not necessarily been done on an annual basis; it has not been done in the last ten years or so.
9. The Town Clerk helps to create the budget for the work of her office, such as estimating the cost of elections (election workers, printing) and the cost of supplies. She provides or forwards this information to the Deputy Treasurer who "works up" the numbers for the budget. The Town budget is created and presented by the Town Manager to the Town Council. The Town Clerk is present at budget meetings in order to answer questions about her budget needs.
10. Many of the functions of the Town Clerk's office (such as elections and vehicle registration) must be carried out in

accordance with state law, state regulation and town ordinance. The Town Clerk creates and implements some policies regarding the operation of the office.

11. The Town Clerk spends the majority of her time (approximately two-thirds to three-quarters) performing the day-to-day functions of the office, such as vehicle registration, record maintenance and other service to the public. The office is a very busy one with a small staff which makes this a necessity. The Town Clerk spends only a minimal amount of time supervising the CSRs or performing management functions.
12. The purpose of the position of Code Enforcement Officer ("CEO") is to ". . . perform administrative, supervisory, and inspection work related to the enforcement and interpretation of the state building code, the local zoning ordinances, Shore Land Zoning Ordinance and other applicable regulations" (Union Exh. No. 5).
13. The decisions of the CEO are appealable to the Town Zoning Board of Appeals, and it is part of the CEO's job to appear before the Board as part of any appeal.
14. The present CEO, Joseph Rousselle, has served in his position for 9 years. Article II, Sec. 3-21 of the Town Ordinance provides that the head of the Department of Code Enforcement is the CEO.
15. The CEO works on a full-time basis. The only other employee in the Code Enforcement Department is an Administrative Assistant who works half-time for the CEO and half-time for the Town Assessing Agent. The CEO is the only person performing the "front line" work needed of his position (i.e., performing building and plumbing inspections, issuing permits, etc.). The CEO also occasionally performs this same type of work for other area towns when their CEO's are on vacation or otherwise unavailable.

16. The Town Manager hired the Administrative Assistant who works half-time for the CEO; the CEO was not involved in that decision. The CEO is involved in the annual performance evaluation given to the Administrative Assistant.
17. The CEO was hired by the Town Manager, as reflected in a letter dated July 9, 2001 (Union Exh. No. 6). In the letter, Mr. Rousselle was advised that he would serve a six-month probationary period and that he was expected to complete the Maine State Code Enforcement Training and Certification program within the first year of his employment.
18. State law provides that municipal officers may appoint code enforcement officers trained and certified in accordance with state law to serve for fixed terms of one year or more, and may remove those code enforcement officers only for cause after notice and hearing. 30-A M.R.S.A. § 2601-A.
19. The CEO was sworn in by the Town Clerk on more-or-less an annual basis for the first several years of his employment. In recent years, he has not been sworn. He has also been sworn in by the clerks of other towns where he serves as an occasional fill-in CEO.
20. The CEO is unaware of any involvement by the Town Council in his hire, or in confirming his hire.
21. The CEO helps to create the budget for the work of his office and for the Zoning Board of Appeals, such as estimating the cost of payroll, mileage and supplies needed. One year, the CEO sought to have the cost of a new vehicle placed in the budget. The CEO supplies the budget information to the Town Manager who creates and presents the budget to the Town Council. The CEO is present at budget meetings in order to answer questions about his budget needs.
22. Many of the functions of the code enforcement office must be

carried out in accordance with state law, state regulation and town ordinance. The CEO creates and implements some policies regarding the operation of the office; he has, for instance, streamlined some form documents used in the office.

23. The CEO spends the majority of his time (approximately 80 percent) performing the day-to-day functions of the office, such as performing building and plumbing inspections, issuing permits, and consulting with residents and contractors about shoreland zoning. He is the only town employee qualified to do this work. The CEO spends only a minimal amount of time supervising the Administrative Assistant or performing management functions.
24. The purpose of the position of Assessing Agent is to be " . . . responsible for the appraisal and assessment of all real and personal property within the Town, to prepare warrants for the assessment and collection of taxes to raise town revenues and to provide for the administration of the assessment process, records, and budget. The work involves some fieldwork in the review of new and existing properties, analyzing and responding to abatement applications, responding to taxpayer and customer inquiries, supervision of a small staff, and defending assessments before the Board of Assessment review and other applicable courts and boards" (Union Exh. No. 7).
25. The Assessing Agent is employed pursuant to an agreement between the towns of South Berwick and North Berwick dated September 20, 2005. The purpose of the agreement is for the two towns (in which the town council/selectmen legally serve as the assessors) to share 60/40 the services of a qualified assessor to assist them in their duties. Relevant provisions of the agreement include:



- the Assessing Agent works three days in South Berwick and two days in North Berwick, on average, each week;
- the Assessing Agent is an employee of South Berwick for administrative purposes and must comply with all personnel policies of South Berwick;
- the Town of North Berwick reimburses the Town of South Berwick each year for 40 percent of costs of employing the Assessing Agent (including wages, benefits, training, membership dues, etc.);
- the Assessing Agent is hired upon approval of the Town Manager of each town and the confirmation of the Municipal Officers in each town.
- the Assessing Agent may be discharged for cause " . . . after a joint meeting of the Municipal Officers of the [towns] to discuss the issue of termination and the majority vote of each Council/Board acting independently";
- either town may terminate the sharing agreement with 180 days' notice prior to the last day of the other town's fiscal year; in this case, the employment of the Assessing Agent " . . . shall terminate upon termination of this agreement, provided either municipality may thereafter hire the Assessing Agent as its employee."

26. The present Assessing Agent, Craig Skelton, has served in this position pursuant to the two-town agreement since February, 2007. The Town Managers of both towns were involved in interviewing Mr. Skelton. Mr. Skelton's employment was confirmed by letter to him from the Town Manager of South Berwick, dated February 5, 2007 (Union Exh. No. 8). In the letter, Mr. Skelton was advised that he would serve a six-month probationary period. The letter further stated: "As we discussed you shall be an employee of the Town of South Berwick. Per the agreement we have entered into dated September 20, 2005, 40 percent of your

time will be spent in North Berwick. If the Town of North Berwick chooses at any time not to share your services, you will remain an employee of the Town of South Berwick."

27. Minutes from the February 12, 2007, meeting of the South Berwick Board of Assessors (the Town Council) state that the Board unanimously voted to confirm the appointment of Mr. Skelton.
28. The Assessing Agent is primarily supervised by the Town Manager of South Berwick, although he is also under the supervision of the Town Manager of North Berwick when he is performing services for that Town. The South Berwick Town Manager completes the annual performance evaluation for Mr. Skelton, after receiving input from the North Berwick Town Manager.
29. Mr. Skelton receives all the same benefits as other South Berwick employees pursuant to the town's personnel policy. In the past year, North Berwick budgeted for a COLA increase for their portion of the cost of Mr. Skelton's employment, in anticipation that South Berwick would be giving its employees a COLA increase. However, South Berwick determined not to give its employees a COLA, and therefore Mr. Skelton was not given a COLA.

#### DISCUSSION

The two issues presented in this matter are (1) whether the positions of Town Clerk and Code Enforcement Officer are "department heads" within the meaning of 26 M.R.S.A. § 962(6)(D) and therefore not public employees who may be included in the South Berwick professional bargaining unit, and (2) whether the position of the Assessing Agent shares a community of interest with the other positions in the bargaining unit as the position is "shared" 60/40 with the Town of North Berwick. These issues will be addressed, in turn, below.

Whether either the Town Clerk or the CEO are "department heads"

Section 962(6)(D) provides that a "public employee" means any employee of a public employer, except any person who is a "department head or division head appointed to office pursuant to statute, ordinance or resolution for an unspecified term by the executive head or body of the public employer." The exception, by its own terms, requires that the employee must be appointed by the executive head or body of the employer. In addition, the employees' duties must demonstrate that they serve as the functional head of a department or division within the employer's workplace. The hearing examiner will first discuss whether either the Town Clerk or the CEO were appointed as required by the exception. Second, the hearing examiner will discuss whether either position can be considered a "department head" based on their actual duties.

The "appointment" requirement of the department head exclusion actually has four requirements: the department head must be "appointed to office," the appointment must be pursuant to a statute, ordinance or resolution, the appointment must be for an unspecified term, and the appointment must be made by the executive head or body of the public employer. There must be some greater significance or formality to "appointments" than is the case with the general hiring process. See Teamsters Local 340 and Presque Isle, No. 92-UD-10 (MLRB Aug. 18, 1992) (when city charter gives the city council discretion to make one-year appointments to all employment positions in city, this is at odds with the intent of the MPELRL). In the vast majority of Board cases on this issue, the department head was appointed by or at least confirmed by the selectmen or city council. See, e.g., AFSCME Council 93 and Town of Sanford, No. 92-UD-03 (MLRB Feb. 21, 1992), aff'd, 92-UDA-03 (MLRB May 7, 1992) (appointed by selectmen); Teamsters Local Union No. 48 and Town of Wells, No. 84-A-03, slip op. at 6-7 (MLRB Apr. 11, 1984), aff'd sub nom.

Inhabitants of the Town of Wells v. Teamsters Local Union No. 48, CV-84-235, York Sup. Ct. (Feb. 28, 1985) (appointed by selectmen). The Board has made clear that if the statute, ordinance, or resolution relied upon by the employer to establish appointment requires confirmation by the executive body, then evidence of confirmation by the executive body is required; further, the confirmation step in the appointment process is what distinguishes the appointment of department heads from ordinary hires. Town of Topsham and District Lodge #4, IAMAW, No. 02-UCA-01 (MLRB Aug. 29, 2002) (evaluating the failure of the employer, a town that had adopted the Town Manager Plan, to produce evidence that the town clerk's appointment was confirmed by the selectmen).

Article I, Sec. 2 of the Charter for the Town of South Berwick<sup>1</sup> makes clear that the Town Council is the "executive body" of the town:

The administration of all the fiscal, prudential and municipal affairs of said town, with the government thereof, except the general management, care, conduct and control of the schools of said town, and also except as otherwise provided by this charter, shall be and are vested in one body of 5 members, which shall constitute and be called the town council . . . .

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<sup>1</sup>The Employer did not actually articulate which "statute, ordinance or resolution" upon which it was relying to support its argument that these two positions were appointed. The Employer's sole documentary evidence was a two-page portion of town ordinances which contained contradictory information on this question (e.g., the head of the Department of Records is identified as the Town Clerk who is "appointed by the Town Manager and serve [sic] at its pleasure;" the Town Clerk is also identified as a Town Council appointment who serves at the pleasure of the Town Council). Given this paucity of evidence, it would be possible to determine that the Employer has not met its responsibility of producing evidence to support its contention. Instead, the hearing examiner reviewed the Town Charter in order to attempt to resolve this contradiction; she advised the parties in writing that she would take official notice of the Town Charter, and received no objections to this notification.

The Town Manager is appointed by the town council and is the ". . . administrative head of the town and shall be responsible to the town council for the administration of all departments assigned to him" (Article III, Sec. 1 of the Charter). Article III, Sec. 3 of the Charter further provides that "All statutory officers and department heads, other than those listed in Article II, section 3, subsection I [Town Manager and Town Attorney] shall be appointed by the town manager, subject to confirmation by the town council, and the same shall be subject to removal for just cause." Town ordinances provided by the Employer (§§ 3-20, 3-29) identify the Town Clerk as the head of the Department of Records and the CEO as the head of the Department of Code Enforcement. Finally, neither the Charter nor the ordinances refer to a specific period of appointment (e.g., a one-year term of appointment); therefore, appointments are for an unspecified period.<sup>2</sup>

Based upon this review of Town Charter and ordinances, department heads (including the Town Clerk and the CEO) are appointed by the Town Manager, subject to confirmation by the Town Council (the executive body of the Town of South Berwick), for an unspecified term. Pursuant to Topsham, therefore, evidence that the appointments of the two positions were confirmed by the Town Council would be essential to meeting the appointment requirement of the "department head" exception.<sup>3</sup>

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<sup>2</sup>The Charter provides only that the department heads are subject to removal for just cause. In addition, the two positions at issue here were advised that they were required to serve a six-month probationary period. Both of these facts support a conclusion that the appointment, if properly made, was for an unspecified period.

<sup>3</sup>State law regarding the appointment of CEO's who are trained and certified provides that the appointment be made by "municipal officers," elsewhere defined as the selectmen or councillors of a town. See 30-A M.R.S.A. §§ 2001(10), 2601-A. While, again, not offered by the Employer as the legal authority for appointment, these state laws further supports a finding--for the CEO--that the town council was required to make or at least confirm the appointment.

The Employer did not provide any evidence that the appointment of the Town Clerk and CEO was confirmed by the Town Council, as required by the Town Charter. Such evidence might have included minutes from a relevant Town Council meeting, or other resolution (Union Exhibit No. 8 contained such evidence regarding the appointment of the Assessing Agent). Both the Town Clerk and the CEO testified that they were hired by the Town Manager with no (known) involvement by the Town Council. The letters of employment from the Town Manager sent to both incumbents in these positions make no reference to their appointment or confirmation of appointment by the Town Council. The only evidence regarding the possible appointment by the Council was provided by the Town Clerk (the Council secretary) who testified:

When I first started working for the town, in one of the June council meetings there was generally a list provided for the council that basically listed all of the municipal officials, and they just affirmed that those were the municipal officials for the upcoming year. That hasn't been done I'm going to say for maybe 10 years.

Transcript at 10.

This was scant evidence that the Town Council confirmed the appointment of the Town Clerk (and even more scant regarding any confirmation of the CEO, who has been employed by the Town less than 10 years). In conclusion, if the determination whether these position are "department heads" truly turned on the appointment issue, the hearing examiner would find, supported by the Board's reasoning in Topsham, that the Town has failed in its responsibility to produce evidence that the appointments were made pursuant to statute, ordinance or resolution. However, the question of whether either position functions as a department head is so clear that the appointment question can remain

unresolved.

The inquiry of whether a position is a "department head" must focus on the actual job duties or functions of the position, not the job title alone or its placement on the employer's organizational chart. In interpreting the (6)(D) exclusion, the Board has looked at the three types of job duties normally inherent in a department or division: day-to-day, rank-and-file work; supervision of other employees; and formulating and administering department policies and practices--management of the department. The Board has found that the "primary function" of the position must be in managing and directing the affairs of the department, in an analysis worth quoting at length:

Our cases establish that for an employee to be a "department head" within the meaning of Section 962(6)(D), the employee's primary responsibility must be that of managing or directing the affairs of the department, as opposed either to acting as a supervisor or to performing the day-to-day work of the department. For example, in Teamsters Local 48 and City of Portland, No. 78-UD-39, slip op. at 2 (MLRB Sept. 13, 1978), the hearing examiner declared 12 employees to be Section 962(6)(D) division heads because they were 'responsible for the day-to-day administration' of their divisions, and because their principal duties were those of 'formulating and administering division policies and practices.' On the other hand, in Teamsters Local 48 and Town of Bar Harbor, No. 80-UD-09, slip op. 3 (MLRB Nov. 15, 1979), a Treatment Plant Operator who was responsible for the day-to-day operation of the treatment plant and who performed such administrative duties as setting the work schedules of other employees, arranging for the purchase of equipment and supplies, and submitting a budget to the town manager, was found not to be a department head because, among other things, the employee 'spent the major portion of his time performing the same work as other operating employees.' See also Teamsters Local 48 and Boothbay Harbor Water System, No. 82-UD-29, slip op. at 6-8 (MLRB May 11, 1982) (Foreman who performed various administrative duties was not an administrator because 'on balance the primary function of the foreman's position is to act as a supervisor'). Our

cases thus require hearing examiners, when presented with evidence showing that an employee performs both administrative duties and supervisory or rank-and-file duties, to decide whether the primary duties of the position are those of an administrator or those of a supervisor or a rank-and-file employee.

Teamsters Local Union No. 48 and Town of Wells, No. 84-A-03, slip op. at 6-7.

By "primary function" the Board has made clear that it means how much time the position spends performing administrative duties, as opposed to supervising or performing day-to-day duties. In Town of Wells, for instance, the Board found that a code enforcement officer's enforcement and licensing duties were far more significant in terms of the employee's "time and effort" than were his administrative duties.<sup>4</sup> It is likely for this reason that "department heads" as defined have been found employed by larger municipalities or other public employers, as it is within these larger entities that management function of a department is genuinely given over to department heads, and department heads actually spend the majority of their day as an administrator or manager. See, e.g., Maine State Employees Association and State of Maine Judicial Department, No. 98-UC-01 (Jan. 21, 1998); Teamsters Local 48 and City of Portland, No. 78-UD-39 (MLRB Sept. 13, 1978).

In the present matter, both the Town Clerk and the CEO spend the great majority of their time performing the day-to-day or "front line" functions of the duties of their respective departments. In the case of the Town Clerk, despite having two part-time employees also performing the "counter" work for the town office, the sheer amount of counter work requires the Town

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<sup>4</sup>The hearing examiner could find no Board cases in which Code Enforcement Officers have been found to be department heads. Teamsters Local Union No. 48 and Town of Wells, supra (and cases cites therein); AFSCME Council 93 and Town of Sanford, No. 92-UD-03 (Feb. 21, 1992).



Clerk to spend the majority of her time performing the same work as these employees. In the case of the CEO, he is the only employee in his "department" who does the day-to-day enforcement work and he is the only one qualified to do the work. Both the Town Clerk and the CEO spend a small amount of their time supervising employees (directing, doing performance evaluations, and the like). However, this supervisory work does not make them a department head. The only true "department head" functions either of these positions perform (budget work, creating policies for the operation of their departments) make up a very small part of their time on the job. In neither case could it be determined to be the "primary function" of their job.

For these reasons, the hearing examiner finds that neither the Town Clerk nor the CEO are "department heads" within the meaning of § 962(6)(D). Pursuant to the stipulations entered into by the parties, the employer agrees that both positions should therefore be part of the proposed professional bargaining unit.

Whether the Assessing Agent shares a community of interest with the other positions in the proposed unit

As the Law Court has recognized, there are two fundamental purposes of the MPELRL: to protect employees' right to self-organization and to promote the voluntary adjustment of their terms of employment. Lewiston Firefighters Ass'n, Local 785, IAFF v. City of Lewiston, 354 A.2d 154, 160 (Me. 1976). Coherent bargaining units with a clear and identifiable community of interest are essential to both of these objectives. The requirement that the hearing examiner examine the extent of the community of interest was explained by the Board over 20 years ago, 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, slip op. 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.

In the present matter, the Assessing Agent clearly shares a community of interest with the other and varied positions already in the proposed bargaining unit, considering most of the community of interest factors listed above--including, but not limited to, similarity in kind of work, scale and manner of determining earnings, similarity in employment benefits, similarity of qualifications, and frequency of contact or interchange. In addition, the Assessing Agent testified that he wishes to be part of the bargaining unit (desires of the affected

employee).

The Employer's argument that the Assessing Agent does not share a community of interest rests entirely on the fact that his employment is "shared" with the Town of North Berwick pursuant to an agreement between the two towns. Despite the existence of this agreement (and the fact that the Assessing Agent works two days per week in North Berwick), South Berwick maintains effective control over most of the terms and conditions of employment that are the usual subject of collective bargaining. The agreement provides that the Assessing Agent is "an employee of the Town of South Berwick for administrative purposes and shall comply with all of the provisions contained within the Town of South Berwick's personnel policy." In regards to all the usual "money" issues that are part of negotiating a collective bargaining agreement (wages, benefits, vacation and medical leave, training costs, etc.), the Assessing Agent is treated no differently than any other employee of South Berwick. By terms of the agreement, North Berwick has effectively ceded its authority over these issues in order to obtain the part-time services of the Assessing Agent: If the Town of South Berwick and the Union negotiated for higher wages for this position, or the cost of benefits increases, the Town of North Berwick must either pay 40 percent of the costs per the agreement or decide to terminate the agreement.<sup>5</sup> The Town of South Berwick has advised the Assessing Agent that if North Berwick chooses not to share in his services, he would remain an employee of South Berwick. Therefore, in most matters relating to terms and conditions of employment, the Assessing Agent is an employee of South Berwick and shares a strong community of interest with the other

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<sup>5</sup>This conclusion is also supported by the uncontradicted testimony of the CEO that North Berwick budgeted to pay his COLA as a South Berwick employee, even though such was not budgeted for other North Berwick employees.

positions in the unit.

One aspect of the Assessing Agent's employment, however, is different from other South Berwick employees. Per the two-town agreement, the Assessing Agent may be terminated for cause ". . . after a joint meeting of the Municipal Officers of the municipalities to discuss the issue of termination and the majority vote of each Council/Board, acting independently." No matter what process the Town currently offers to other employees prior to discharge, such process would obviously not involve the participation of a separate employer (North Berwick), as it would for the Assessing Agent. Does this fact make the Assessing Agent so unique that he no longer shares a sufficient community of interest with the other positions to enable them to bargain together? The hearing examiner concludes that it does not significantly undermine the community of interest that the Assessing Agent already shares with the other positions in the unit.

First, this discharge provision has never been utilized, and the witnesses were clearly unsure how the process would actually work. On its face, the agreement provides that to discharge the Assessing Agent requires the vote of both the Town Council of South Berwick and the Selectmen of North Berwick. If either municipal body votes not to discharge the Assessing Agent, the agreement seems to provide that he will not be discharged (the option of terminating the agreement is still available to either town). One could say that the Town of South Berwick has ceded some authority in a decision to discharge the Assessing Agent to North Berwick, as it cannot discharge the Assessing Agent on "its own." This places the Assessing Agent in a unique position vis-a-vis other employees in the bargaining unit, which the parties may choose to make the subject of negotiations.<sup>6</sup> However, this

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<sup>6</sup>For example, if the collective bargaining agreement contained a post-discharge grievance process including a step to be presented to the Town Council, the unique position of the Assessing Agent--who can

distinction does not seem to be an insurmountable barrier to collective bargaining.

Second, it is not unknown for an employer with organized employees not to be in complete control of every term and condition of employment for those employees. For instance, public sector employers may receive grants that fund work of some employees from "outside" sources that may end after a period of time or be dependent upon the quality of the work being performed. The Board has not found this fact to require employees funded in this manner to be excluded from collective bargaining. See, e.g., Teamsters Local 340 and City of Presque Isle, 92-UD-10, at 32 (MLRB Aug. 18, 1992) (secretary working in a job funded by a grant has reasonable expectation of employment and placed in municipal employee unit); AFUM and University of Maine, 77-UD-02, at 6-9 (MLRB Aug. 4, 1978) (soft-money non-tenure track faculty were regular employees and placed in full-time faculty unit). In a similar vein, the National Labor Relations Board (NLRB) found in Management Training Corporation, 317 NLRB 1355 (1995), that it is proper to exert jurisdiction over employers who do not have control of all terms and conditions of employment of its employees (in that case, a private company that contracted with the U.S. government to operate a job corps center), rejecting its previous line of cases that required an assessment of such an employer's ability to engage in "meaningful" bargaining before exerting jurisdiction. The NLRB reasoned:

" . . . [W]e think that whether there are sufficient employment matters over which unions and employers can bargain is a question better left to the parties at the bargaining table and, ultimately, to the employee voters in each case. . . . [B]y requiring the employer

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only be discharged following the vote of the Town Council--may require different process. Such matters would be up to the parties to determine and to negotiate.

to have control of economic terms before it would assert jurisdiction, the Board seems to have made a judgment, either directly or indirectly, that not only were certain contract terms of higher priority than others, but that such terms must be a part of contract negotiations. This, we think, amounts to the Board's entrance into the substantive aspects of the bargaining process which is not permitted . . . ."

Management Training Corp., at 1355, 1358.<sup>7</sup>

Likewise in the present matter, the Town of South Berwick is in control of many--if not most--of the terms and conditions of the Assessing Agent's position. The two-town contract may raise concerns that the parties will wish to address at the bargaining table (and the employees in the unit may wish to consider when deciding whether to elect a bargaining agent). But it would be an error and premature to use this fact to find that the Assessing Agent lacks such a community of interest with his fellow South Berwick employees that he should be denied the right --which he clearly has as a public employee--to be represented by a labor organization for purposes of collective bargaining. For these reasons, the hearing examiner finds that the Assessing Agent shares a community of interest with the other positions in the proposed bargaining unit within the meaning of § 966(2).

#### CONCLUSION AND ORDER

On the basis of the foregoing facts and discussion and pursuant to the provisions of 26 M.R.S.A. § 966, the petition for unit determination filed on April 1, 2010, by James E. Carson on

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<sup>7</sup>This case was extensively and favorably cited in MSEA and Maine Judicial Department, No. 99-UD-04 (MLRB Nov. 30, 1998). In that case, the hearing examiner dismissed the claim that employees of a temporary agency ("Manpower") who worked for the Maine Judicial Department were within the jurisdiction of the MLRB, not the NLRB, rejecting any attempt to "split" jurisdiction on the premise that the temporary agency controlled some terms and conditions of employment and the Maine Judicial Department controlled others.

behalf of the Teamsters is granted. The following described unit is held to be appropriate for purposes of collective bargaining:

INCLUDED: Accountant/Deputy Treasurer, Deputy Tax Collector/Personnel Benefits Administrator, Director of Planning and Economic Development, Police Lieutenant, Town Clerk, Code Enforcement Officer, and Assessing Agent.

EXCLUDED: All other employees of the Town of South Berwick.

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

Dated at Augusta, Maine, this 16th day of July, 2010.

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. § 968(4), to appeal this report to the Maine Labor Relations Board. To initiate such an appeal, the party seeking appellate review must file a notice of appeal with the Board within fifteen (15) days of the date of issuance of this report. See Chapter 10 and Chap. 11 § 30 of the Board Rules.