

STATE OF MAINE

MAINE LABOR RELATIONS BOARD  
Case No. 16-UD-09  
Issued: July 11, 2016

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LABORERS' LOCAL 327, )  
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 Petitioner, )  
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 and )  
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 TOWN OF SEARSPORT, )  
 )  
 Employer. )

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UNIT DETERMINATION  
REPORT

PROCEDURAL HISTORY

This unit determination proceeding was initiated on April 7, 2016, when Mr. Devin Mayo, Regional Organizer for the Laborers' International Union of North America, Local 327 ("Union"), filed a petition for unit determination and bargaining agent election with the Maine Labor Relations Board ("Board") seeking the creation of a bargaining unit consisting of the following classifications of employees of the Town of Searsport: Waste Water Treatment Chief Operator and Operator; Public Works Foreman, Equipment Operator/Driver, Building/Grounds Maintenance, Transfer Station Attendant, and Police Patrol Officer. The petition was filed pursuant to § 966 (1) and (2) of the Municipal Public Employees Labor Relations Law ("Act"), 26 M.R.S. § 961 et seq. The Town of Searsport "Town" filed a timely response to the petition on April 22, 2016. The Town objected to the granting of the relief sought because: 1) the position of Public Works Foreman is a department head, within the definition of 26 M.R.S. § 962 (6)(D) and cannot be included in any bargaining unit; 2) the Chief Operator of the Waste Water Treatment Plant is appointed to office for a specified term, within the meaning of 26 M.R.S. § 962 (6)(B) and cannot be included in any bargaining unit; 3) the Transfer Station Attendant is a part-time

employee and should be excluded from the unit; and 4) the Police Patrol Officers do not share a community of interest with the other employees and should constitute a separate bargaining unit.

Due notice having been given, an evidentiary hearing on the petition was held at the Board hearing room in Augusta, Maine, on June 1, 2016. Mr. Mayo appeared on behalf of the Union and John K. Hamer, Esq., appeared on behalf of the Town. Prior to commencement of the formal hearing, the following exhibits were admitted into evidence:

- Joint Exhibit A: Public Works Director Job Description  
(old and new)
- Joint Exhibit B: WWTP Chief Operator Job Description
- Joint Exhibit C: Annual Appointments (2009-2016)  
(WWTP Superintendent)
- Joint Exhibit D: Town Organizational Chart
- Joint Exhibit E: Minutes Town Selectmen's Meeting  
March 21, 1995
- Joint Exhibit F: Title 30-A M.R.S. §§ 2601 and 2636
- Joint Exhibit G: Searsport Personnel Policy, § 2

In addition, the Town withdrew its objection to the Transfer Station Attendant (presently vacant) being included in the employees' bargaining unit.

The Union presented Christopher E. Tucker, Lead Organizer, as its only witness. The Town's sole witness was Town Manager James S. Gillway. The parties were given the opportunity to examine and cross-examine witnesses, offer evidence, and present post-hearing argument. A post-hearing brief on behalf of the Town was submitted on June 29, 2016. No post-hearing argument was received from the Union.

The Town Manager served as the Searsport Police Chief for 15 years before becoming the Town Manager. After the Town Manager testified about the operations of the Police Department, the

parties reached agreement on a separate bargaining unit consisting of the Patrol Officers and an agreement on appropriate bargaining unit was signed.

#### JURISDICTION

The jurisdiction of the executive director to hear this matter and to make a determination lies in 26 M.R.S.A. § 966 (1) and (2).

#### STIPULATIONS

The parties stipulated to the following facts:

1. The Petitioner, the Laborers' International Union Local 327, is a public employee organization within the meaning of 26 M.R.S. § 962 (2).

2. The Respondent, the Town of Searsport, is a public employer within the definition of 26 M.R.S. § 962 (7).

3. The Waste Water Treatment Plant Operator, Public Works Equipment Operator/Driver Building/Grounds Maintenance, and the Transfer Station Attendant all share a clear and identifiable community of interest.

4. The Police Patrol Officers share a clear and identifiable community of interest.

#### FINDINGS OF FACT AND DISCUSSION

The Town contends that two of the positions at issue in this case are excluded from the statutory definition of "public employee" and, pursuant to § 966(1), cannot be included in any bargaining unit. The Board has held that, since the public policy reflected in the Act is to grant public employees the right to bargain collectively, the exceptions from the coverage of the Act must be narrowly construed. *Town of Topsham and Local S/89 District Lodge #4, International Association of Machinists and Aerospace Workers*, No. 02-UCA-01, at 12 (MLRB Aug. 29, 2002).

The first exclusionary designation I will consider is that of the Waste Water Treatment Plant ("WWTP") Chief Operator/

Superintendent, pursuant to § 962 (6)(B) of the Act. That provision excludes from the definition of "public employee" any person:

Appointed to office pursuant to statute, ordinance or resolution for a specified term of office by the executive head or body of the public employer, except that appointees to county offices shall not be excluded under this paragraph unless defined as a county commissioner under Title 30-A, section 1302;

The hearing officer analyzed this provision extensively in *Teamsters Union Local 340 and City of Presque Isle*, No. 92-UD-10, at 16-25 (Aug. 18, 1992). Reviewing this exclusion in light of the relevant provisions of Title 30-A as they existed at that time, the hearing examiner concluded that, by referring to appointments to office, this provision was not intended to exclude any town employee appointed for a fixed term from the general grant of the right to engage in collective bargaining. The hearing examiner concluded:

These provisions taken together suggest that officials are those high enough in municipal government for political responsiveness to be expected, either through election or through fixed-term appointment. The case is even more convincing when one looks at a distinction Title 30-A makes between officials and employees, in addition to the length of appointment. Both officials and employees have just cause protection under section 2601. However, section 2701 requires employees who have just cause protection to first complete any applicable probationary period. 30-A M.R.S.A. 2701 (Supp. 1991). Probation is not mentioned for officials. That is not surprising, if appointed "officials" are meant to be politically responsive. Appointment for a fixed term should not protect an official's wrongdoing, so a municipality's right to remove an official before his/her term is up, for cause, is not inconsistent with the concept of the politically responsive appointment. On the other hand, the concepts of probation and political responsiveness are inconsistent.

*Id.*, at 23-4. Testing water and recording the results, mixing and adding chemicals, and operating and maintaining the equipment of

the waste water treatment plant, require technical and mechanical knowledge and experience, but do not constitute the sort of politically responsive work warranting an exclusion from coverage of the Act pursuant to § 962(6)(B).

Title 30-A, § 2001 (11) defines "Municipal official" as being "any elected or appointed member of a municipal government." While Title 30-A does not further define the term "official," § 2603, **Deputy officials**, provides that "[t]he clerk, treasurer and collector of a municipality may each appoint in writing one or more qualified persons as deputies." The WWTP Chief Operator/Superintendent is not included in this provision.

The record evidence regarding the 962 (6)(B) exclusion is that the incumbent has been appointed to a series of one-year appointments, each year for the last 9 years. The job description for the WWTP position does not include anything suggesting, much less warranting, political responsiveness. This evidence is insufficient to warrant the exclusion sought. In addition, the excerpt of the Town's personnel policy provided includes a lengthy list of positions which the Town regards as being town "officials." While some, including the Town Manager, hold office as contemplated in § 962 (6)(B), the Waste Water Treatment Plant position is not on the list. **On the basis of the record presented, I conclude that the exclusionary designation sought for the Waste Water Treatment Plant Chief Operator/Superintendent based on § 962 (6)(B) of the Act has not been established and must be denied.**

The Town alleges that the Public Works Foreman is a department or division head, within the meaning of § 962 (6)(D), and further alleges that, in the event that the WWTP Chief Operator/Superintendent is not excluded from coverage by virtue of § 962

(6)(B), that position is also a department head within the meaning of § 962 (6)(D).

That provision of the Act excludes from the statutory definition of "public employee" any person:

Who is a department 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.

In interpreting the (6)(D) exclusion, the Board has examined both the appointment process used in naming department heads and the actual job duties of the position. In the instant case, the appointment requirement set forth in the exclusion has not been satisfied with regard to either position at issue.

With regard to the WWTP position, the Town Manager testified that he nominated the Superintendent for appointment and the Board of Selectmen approved a series of one-year appointments for the last 9 years. Joint Exhibit C confirms that at least back to the year running from April 1, 2009, to March 31, 2010. **One-year appointments are plainly not "for an unspecified term;" therefore, the WWTP position does not qualify for a § 962 (6)(D) exclusion.**

The formal appointment process for the Public Works position is also problematic. Title 30-A, M.R.S. § 2636 sets forth the powers and duties of a town manager. Subsection 4 provides that a town manager "[s]hall serve in any office as the head of any department under the control of the selectmen when directed by the selectmen." Subsection 5 states that a town manager:

**Appoint department heads.** Shall appoint, subject to confirmation by the selectmen, supervise and control the heads of departments under the control of the selectmen when the department is not headed by the town manager under subsection 4;

While the Town Manager testified that he considers the Public Works Foreman/Director to be a department head, the record is ambiguous, at best, regarding the appointment of the incumbent to this position. The Minutes of the Selectmen's Meeting of March 21, 1995, establish that "[t]he Board approved the Town Manager's appointment of Robert Seekins as Highway Foreman, effective April 1, 1995." While no contemporaneous job description for the Highway Foreman was introduced, that from October 1996 was produced. It is not clear that the foreman was a department head at the time of appointment or for an extended time thereafter. The April 18, 2002, job description states that the "Public Works Director performs the statutory functions of Commissioner of Roads;" however, from the calendar year beginning April 1, 2009, through that ending on March 31, 2017, the Board of Selectmen have appointed the Town Manager to serve as Road Commissioner, through annual appointments. **The evidence in the record fails to establish that the Public Works Foreman/Director was appointed in the manner required by 30-A M.R.S. § 2636 (5), therefore, the position does not qualify for a § 962 (6)(D) exclusion.**

Although the problems with the formal appointments involved are dispositive in this matter, the job functions of the two positions also fail to warrant § 962 (6)(D) exclusions. Once the formal appointment requirement has been met, the Board's focus turns to an examination of the job functions actually performed by individuals for whom a (6)(D) exclusion is claimed. In its analysis, the Board has identified three types of job duties normally found in any department or division: day-to-day, rank-and-file work; supervision of other employees; and formulating and administering department policies and practices--managing the department. The Board holds that, to warrant a (6)(D) exclusion, the "primary function" of the position must be managing and directing the affairs of the department. *Teamsters Local Union No.*

48 and Town of Wells, No. 84-A-03, at 6-7 (MLRB April 11, 1984), *aff'd sub nom Inhabitants of the Town of Wells v. Teamsters Local Union No. 48*, No. CV-84-235, at 2-3 (Me. Super. Ct., York Cty., Feb. 28, 1985). By "primary function," the Board means how much time and effort the position spends performing administrative duties, as opposed to supervising or performing the day-to-day duties of the enterprise. *Town of Wells*, at 7-8.

The Public Works Foreman/Director performs administrative duties, including participating in the budget process, soliciting bids for the purchase of materials and services, and directing the operation of the organizational unit on a day-to-day basis. The incumbent employee was not present at the hearing and the Town Manager was unable to quantify the amount or percentage of work time the employee spends performing these functions. The WWTP Chief Operator/Superintendent also performs administrative duties, including the same kind of budget work as the Public Works Foreman/Director and manages the waste water treatment plant operation. The Chief Operator/Superintendent was not present at the hearing and no evidence was presented regarding the amount or percentage of work time the employee spends performing these functions. In the absence of such corroborating facts, the basis for the exclusion cannot be established and the exclusion cannot be granted. *Town of Topsham*, 02-UCA-01 at 12. **On the basis of the record presented, I conclude that neither the Public Works Foreman/Director nor the Waste Water Treatment Plant Chief Operator/Superintendent are department or division heads within the meaning of § 962(6)(D) of the Act; therefore, both are eligible to be represented for purposes of collective bargaining.**

One of the distinguishing aspects of Maine's public sector labor relations laws is that they authorize supervisory employees to be represented by a bargaining agent for purposes of collective

bargaining. While the Act extends collective bargaining rights to supervisors, § 966(1) of the Act provides that they cannot be included in the same bargaining unit as the employees they supervise. Section 966(1) defines supervisors as employees whose principal job functions include 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,

Employees whose jobs primarily involve these supervisory functions may have conflicts of interests with their subordinate employees, therefore the Act provides that they be assigned to a separate supervisory employee unit. *Teamsters Union Local 340 and Town of Warren*, No. 14-UD-03, at 5-6 (Apr. 8, 2014). Both the Public Works Foreman/Director and the WWTP Chief Operator/Superintendent perform some supervisory duties.

The Public Works Foreman/Director schedules, assigns, oversees and reviews the work of the other public works employees; however, no evidence was presented whether the Foreman prepares performance evaluations for the other employees. The Foreman/ Director performs some work that is different from that of the other employees, including the items mentioned above in connection with the department head analysis. The Foreman is the first step of the three-step grievance procedure and has the authority to impose discipline, short of termination. There is no evidence in the record that the Foreman has ever adjusted a grievance or imposed any discipline. There was no mention in the record regarding the development of performance standards or any implementation of such

standards. The Foreman also performs the day-to-day work of the department, driving trucks, operating equipment, ditching roads, salting and sanding roads, and plowing snow. Once again, there is no evidence in the record regarding the amount or percentage of work time the Foreman/Director spends doing those supervisory duties that he does perform. **The evidence in the record does not support the allegation that the supervisory functions are the primary duties of the Foreman.** This is not surprising, since the entire public works crew consists of four employees, including the Foreman.

The WWTP Chief Operator/Superintendent oversees the work of one subordinate employee. The Chief Operator/Superintendent performs some work that is different from that of his subordinate, including the items mentioned above in connection with the department head analysis. The Chief Operator is the first step of the three-step grievance procedure and has the authority to impose discipline, short of termination. There is no evidence in the record that the Chief Operator has ever adjusted a grievance. The Chief Operator imposed some kind of discipline once, approximately 15 years ago. There was no mention in the record regarding the development of performance standards or any implementation of such standards. The Chief Operator also performs the day-to-day work of the department, operating and maintaining the treatment plant and pump stations, testing effluent, and maintaining records relating to waste water treatment. There is no evidence in the record regarding the amount or percentage of work time the Foreman/Director spends doing those supervisory duties that he does perform. **The evidence in the record does not support the allegation that the supervisory functions are the primary duties of the Chief Operator.** Again, this is not surprising, since the entire waste water treatment crew consists of two employees, including the Chief Operator/Superintendent.

Finally, § 966(2) of the Act requires that I consider whether the employees in the bargaining unit sought to be created through a unit determination proceeding share a clear and identifiable community of interest in order to constitute a unit which is appropriate for purposes of collective bargaining. The parties have stipulated that the public works and waste water treatment employees, other than the Foreman/Director, and the Chief Operator/Superintendent, share a clear and identifiable community of interest and, together, constitute an appropriate bargaining unit. The remaining issue is whether the Foreman/Director and the Chief Operator/Superintendent share the requisite community of interest with the other employees to be included in the same bargaining unit with them.

The Board has codified its long-standing community-of-interest analysis in Chapter 11, § 22 (3) of its Rules. The 11 relevant factors are listed below, underscored, followed by the relevant information from the record. The Board's community of interest factors that support finding a shared community of interest are: 1) similarity in the kind of work performed: in addition to performing some administrative and supervisory work, both individuals in the positions at issue perform the same work as the other employees in their respective organizational units; 2) common supervision and determination of labor relations policy: all of the employees are supervised by the Town Manager and are subject to labor relations policies approved by the Board of Selectmen and included in the Town's personnel policy; 3) similarity in the scale and manner of determining earnings: there is no evidence in the record regarding the amount earned by any of the employees; however, they are all compensated on an hourly basis; 4) similarity in employment benefits, hours of work and other terms and conditions of employment: all of the employees' standard work week is Monday through Friday, 7:00 a.m. to 3:00 p.m. and all are

expected to work overtime periodically; all have access to a progressive, three-step grievance procedure (starting with the immediate supervisor, with appeals to the Town Manager, and then to the Board of Appeals); and the terms and conditions of employment for all are determined by the Town personnel policy; 5) similarity in the qualifications, skills and training of employees: the basic qualifications are a high school diploma, a commercial driver's license, and technical training and on-the-job experience, specific to the work being performed; 6) frequency of contact or interchange among the employees: the Foreman/Director has daily contact with other public works employees and the Chief Operator/Superintendent has daily contact with the WWTP Operator; and 10) extent of union organization: including the Police Patrol Officers in a separate unit, the Petitioner appears to be seeking to represent all eligible blue-collar employees of the Town.

The following community-of-interest factors neither support nor rebut a finding of a shared community of interest: 7) geographic proximity: all work within the Town of Searsport; 8) history of collective bargaining: there is no evidence in the record regarding any history of collective bargaining for any of the employees involved; 9) desires of the affected employees: as required by Chapter 11, § 7(11) of the Board Rules, at least 30% of the unit employees submitted a showing of interest in support of the petition and, through hearsay testimony, both the Foreman/Director and the Chief Operator/Superintendent seek representation; and 11) the employer's organizational structure: as a group, all of the employees involved constitute 2 of the 9 organizational units in the Town. **Weighing the several community-of-interest factors individually and together, I conclude that the Public Works Foreman/Director and the Waste Water Treatment Plant Chief Operator/Superintendent share a clear and identifiable community**

of interest with the other public works and waste water employees employed by the Town of Searsport.

CONCLUSION

On the basis of the foregoing facts and discussion and pursuant to the provisions of 26 M.R.S. § 966, the petition for unit determination filed on April 7, 2016, by Devin Mayo, Regional Organizer for the Laborers' International Union of North America, Local 327 ("Union"), as amended to delete the position of Police Patrol Officer, is granted. The following described unit of employees of the Town of Searsport is held to be appropriate for purposes of collective bargaining:

INCLUDED: Waste Water Treatment Plant Chief Operator/  
Superintendent and Operator, Public Works  
Foreman/Director, Equipment Operator/Driver,  
Building/Grounds Maintenance, and Transfer  
Station Attendant

EXCLUDED: All other employees of the Town of Searsport

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

Dated at Augusta, Maine, July 11, 2016

MAINE LABOR RELATIONS BOARD

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Marc P. Ayotte  
Executive Director

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