

_____)	
TOWN OF SEARSPORT,)	
)	
Appellant,)	DECISION AND ORDER ON
)	APPEAL OF
and)	UNIT DETERMINATION
)	
LABORERS' LOCAL 327,)	
)	
Appellee.)	
_____)	

The Town of Searsport filed this unit determination appeal on July 20, 2016, pursuant to 26 M.R.S.A. §968(4) of the Municipal Public Employees Labor Relations Law (the "Act") and Chapter 11, §30 of the Rules and Procedures of the Maine Labor Relations Board (the "Board"). The unit determination report that is the subject of this appeal (No. 16-UD-09) was issued on July 11, 2016. The parties had agreed on the inclusion of several positions in the bargaining unit, but disagreed on the status of two. After an evidentiary hearing, the Hearing Examiner determined that neither the Waste Water Treatment Plant ("WWTP") Chief Operator/Superintendent nor the Public Works Director was excluded from the definition of public employee under the Act. The Hearing Examiner further concluded that the two positions should not be placed in a separate supervisory unit and that the bargaining unit as proposed was an appropriate unit.

In its Memorandum of Appeal, the Town of Searsport challenges the Hearing Examiner's conclusion that the two positions at issue are not excluded from coverage of the Act under either §962(6)(B) or §962(6)(D). The Town further argues that, in the event the

Board affirms the Executive Director's conclusion that the two positions are covered by the Act, the Board should reverse his conclusion that the two positions should not be placed in a separate supervisory bargaining unit.

John K. Hamer, Esq., represented the Town of Searsport during the unit determination hearing and on the appeal. Mr. Devin J. Mayo represented Laborers' Local 327 at the unit hearing. The Union chose not to file a written brief responding to the Town's appeal, other than expressing its strong support for the Hearing Examiner's ruling. The Board, comprised of Chair Katharine I. Rand, Employer Representative Robert W. Bower, Jr., and Employee Representative Amie M. Parker deliberated this matter on September 13, 2016.

JURISDICTION

The Town of Searport is an aggrieved party within the meaning of 26 M.R.S. §968(4) and Chapter 11, §30 of the Rules and Procedures of the Board. The jurisdiction of the Maine Labor Relations Board to hear this appeal and to render a decision herein lies in 26 M.R.S.A. §968(4).

FINDINGS OF FACT

Neither party has taken exception to the facts recited in the Unit Determination Report. The essential facts can be summarized with the following:

- The Town of Searsport operates under the Town Manager Plan, as detailed in Title 30-A, Chapter 123, subchapter 2.
- The Town's 2015 Policy Book, Section 2: Appointive Authority, lists 24 officials appointed by the Board of Selectmen. The WWTP Chief Operator/Superintendent is not on this list. The list of officials is followed by the statement, "These

appointments are made subject to state statute and may be in the form of a contract." The policy further states "The Town Manager appoints Department Heads, subject to confirmation by the Board of Selectmen. The Town Manager also appoints all other employees as authorized by the Board of Selectmen."

- The incumbent WWTP Chief Operator/Superintendent has been appointed to a series of one-year appointments for each of the last 9 years.
- The Minutes of the Selectmen's Meeting of March 21, 1995, state "The Board approved the Town Manager's appointment of Robert Seekins as Highway Foreman, effective April 1, 1995." The minutes also record the appointment of several officials following a formal motion and vote on each appointment.
- The 1996 job description for the Highway Foreman was updated in 2002 and the job title changed to Public Works Director. The Board of Selectmen approves all job descriptions, but no specific action was taken regarding the appointment of Mr. Seekins other than the 1995 approval.
- The Public Works Director supervises 3 employees; the WWTP Chief Operator/Superintendent supervises 1 employee. Both are authorized to plan, schedule, assign, and discipline employees, if necessary. Both perform administrative tasks such as those related to the purchase of equipment and supplies, record keeping, payroll, and preparation of their department's budget. Both are responsible for the technical and mechanical operations of their respective departments and both spend a significant amount of time performing operational tasks.

DISCUSSION

The standard of review for bargaining unit determinations is well established: The Board will overturn a hearing examiner's rulings and determinations if they are "unlawful, unreasonable, or lacking in any rational factual basis." Council 74, AFSCME and Teamsters Local 48, No. 84-A-04 at 10 (Apr. 25, 1984), quoting Teamsters Local 48 and City of Portland, No. 78-A-10 at 6 (Feb. 20, 1979).

Section 962, sub-§6 defines which employees of a public employer are covered by the Act. There are several exceptions to the definition, including the two at issue in this case, paragraphs B and D. These two paragraphs exclude from coverage of the Act any person:

B. 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; or

. . .

D. 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;

26 M.R.S. §962(6).

The Town argues that the WWTP Chief Operator/Superintendent should be excluded pursuant to §962(6)(B) or, alternatively, should be excluded as a department or division head under §962(6)(D). We agree with the Hearing Examiner's conclusion that the WWTP Chief Operator/Superintendent is not excluded from

coverage of the Act under either §962(6)(B) or §962(6)(D) for the following reasons.¹

Sections 962(6)(B) and 962(6)(D) are similar with respect to the appointment process, as both require the employee to be "appointed to office pursuant to statute, ordinance or resolution [for a term] by the executive head or body of the public employer." Although both use the words "appointed to office" at the start of this clause, paragraph B expressly requires the appointment to be "for a specified term of office," while paragraph D requires it to be "for an unspecified term." Thus, the §962(6)(B) exclusion requires that the appointment be both for a specified term and to an "office."

After reviewing the record, we agree with the Hearing Examiner's conclusion that there was insufficient evidence to support the Town's assertion that the WWTP Chief Operator/Superintendent was appointed for a "specified term of office." Although the Selectmen appointed the incumbent to a specified one-year term, there is no evidence that he was appointed to an "office."

The Hearing Examiner noted that the Town's 2015 Policy Book lists 24 "officials" appointed by the Board of Selectmen, but that list does not include the WWTP Chief Operator/Superintendent. The Town produced no evidence that this position was an "office" of any kind or in any sense of the word beyond a synonym for "employment." The statute mandates that the appointment be for a "specified term of office," and we cannot ignore the word office, particularly where the word is omitted from the same phrase in

¹ The Hearing Examiner's conclusion that the WWTP Chief Operator/Superintendent was not an employee excluded under §962(6)(B) relied on Teamsters Union Local 340 and City of Presque Isle, No. 92-UD-10 (Aug. 18, 1992). Our analysis does not rely on Presque Isle, so there is no need to address the Town's assertion that we should overrule that case.

another paragraph of the same statutory section. We therefore affirm the Hearing Examiner's finding that the WWTP Chief Operator/Superintendent was not excluded under §962(6)(B).

The Hearing Examiner's conclusion that the WWTP Chief Operator/Superintendent could not be excluded as a department head under §962(6)(D) is also affirmed because §962(6)(D) requires that the appointment be for an unspecified term. The WWTP Chief Operator/Superintendent's appointment was clearly for a specified term of one year.

With respect to the Public Works Director, the Town disputes the Hearing Examiner's conclusion that the position is not a department head within the meaning of §962(6)(D). All of the components in paragraph D must be met for the exclusion to apply: (1) the executive head or body of the employer must appoint the person for an unspecified term; (2) the appointment must be pursuant to statute, ordinance or resolution; and (3) the primary function of the position must be that of a department head or division head. See, e.g., Town of Topsham and Local S/89 District Lodge #4 IAMAW, No. 02-UCA-01 at 3 (Aug. 29, 2002), aff'd, Topsham v. Local S/89 District Lodge #4 IAMAW, and MLRB, AP-02-68 (Me. Super. Ct., Ken. Cty., March 20, 2003). The Hearing Examiner held that the second and third requirements of this exclusion were not met.

The Hearing Examiner concluded the record lacked evidence that Mr. Seekins was appointed as Public Works Director "pursuant to statute, ordinance or resolution," as required by paragraph D. The Town of Searsport operates under the Town Manager Plan, 30-A M.R.S. Ch. 123, sub-chapter 2, which specifies the powers and duties of the Town Manager in §2636. Sub-section 5 is the

controlling provision with respect to the appointment of department heads. That section states:

5. [The Town Manager] [s]hall appoint, subject to confirmation by the selectmen, supervise and control the heads of departments under control of the selectmen when the department is not headed by the town manager under subsection 4.

30-A M.R.S. §2636(5).

There is no dispute that on March 21, 1995, the incumbent Public Works Director was appointed as Highway Foreman by the former Town Manager and the appointment was approved by the Selectmen.² It was not until 2002 that the job description was updated to indicate the position title of "Public Works Director." The Board of Selectmen approved the new job description, but did not take any action to re-appoint the incumbent. We find no error in the Hearing Examiner's conclusion that the record lacked any evidence that the incumbent functioned as or even was considered a department head at the time of the appointment in 1995 or for several years after.

The Town argues that it "was error to deny the exemption based on the formalities of appointment." We disagree. The formalities of the statute require the department head to be appointed pursuant to statute, ordinance or resolution. The Town Manager Plan statute requires confirmation by the Board of Selectmen and that did not occur. This same point was addressed previously by the Board in Topsham, in which the Board held:

As the Town Manager Plan is the source of the town manager's authority, the limitations on that authority specified in that statute must also be controlling. The Town Manager Plan is unambiguous regarding the

² The minutes of the Board meeting merely indicate that the Board "approved" the Town Manager's appointment of him as Highway Foreman. Every other action of the Board that evening involved a Motion and a recorded vote.

appointment of department heads. Section 2636, subsection 5 states: "[The town manager] shall appoint, subject to confirmation by the selectmen, supervise and control the heads of departments" Confirmation by the selectmen is not presented as an option. When read in conjunction with 26 M.R.S.A. 962(6)(D), which excludes a department head "appointed to office pursuant to statute, ordinance or resolution," it is clear that in order to be appointed to office pursuant to statute, the statute must be followed.

Topsham, No. 02-UCA-01 at 9, aff'd, Topsham v. District Lodge #4 IAMAW and MLRB, AP-02-68 at 4 (Board's interpretation of the appointment requirement is consistent with the language of the statutes).

Although we agree with the Hearing Examiner that the two positions at issue are covered by the Act, we disagree with his conclusion that these positions should be placed in the same bargaining unit as the subordinate employees. Section 966(1) offers guidance on when a supervisory position should be excluded from the proposed 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 Hearing Examiner recognized that the Public Works Director and WWTP Chief Operator / Superintendent in fact perform

some management control responsibilities and work that is different from that of the other employees, including participating in the budget process, scheduling, directing and overseeing the work of others, and, in the case of the Public Works Director, soliciting bids for the purchase of materials and services. The Hearing Examiner also recognized that both positions are the first step in the three-step grievance procedure and possess the authority to issue discipline short of termination. He nonetheless concluded that the evidence was insufficient to support the conclusion that these management control functions were the positions' "primary duties," noting the lack of any evidence that either employee has imposed discipline or adjusted a grievance, and the absence of any evidence concerning the amount or percentage of time the Public Works Director and WWTP Chief Operator / Superintendent spend performing supervisory duties, as opposed to executing the day-to-day work of the department.

Although the amount of time spent performing management control duties may be relevant to whether such duties comprise the "principal functions" of any given position, we are cognizant of the fact that, in smaller towns with smaller departments, supervisors will generally spend less time managing and more time chipping in with the day-to-day work. The management control responsibilities of such supervisors are not necessarily less important or "principal," however. Moreover, the risk of conflict that arises when a supervisor must train, counsel, discipline or hear the grievance of a fellow bargaining unit member is acute, regardless of whether the supervisor has a history of taking such actions or is called upon to take them for the first time.

The job descriptions provide, and there was testimony at hearing to confirm, that the Public Works Director and WWTP Chief Operator / Superintendent are responsible for the operations of their respective departments, including overseeing the work of subordinate employees and ensuring the safe and effective operation of the department. We are persuaded that the principal functions of these positions consist of management control and similar supervisory duties, even if – because of the size of their respective departments, the historically adequate performance of subordinates, and/or the apparent lack of any grievances to date – they do not spend the majority of their time on these duties.

A review of the record and the Hearing Examiner's specific findings regarding the community of interest factors supports our conclusion that the two positions share a community of interest. For these reasons, we conclude that the two positions should be in a separate supervisory unit.

ORDER

On the basis of the foregoing discussion and pursuant to the powers granted to the Board by 26 M.R.S. §968(4), it is ORDERED that the following two bargaining units are appropriate for the purposes of collective bargaining:

SUPERVISOR UNIT

INCLUDED: Waste Water Treatment Plant Chief Operator/
Superintendent and Public Works Director

EXCLUDED: All other employees of the Town of Searsport

OPERATIONS UNIT

INCLUDED: Equipment Operator/Driver, Building/Grounds
Maintenance, Transfer Station Attendant,
and WWTP Operator

EXCLUDED: All other employees of the Town of Searsport

A bargaining agent election for these units will be conducted forthwith.

Dated at Augusta, Maine, this 20th day of October, 2016.

MAINE LABOR RELATIONS BOARD

The parties are advised of their right to seek review of this decision and order by the Superior Court by filing a complaint pursuant 26 M.R.S.A. § 968(4) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

Katharine I. Rand
Chair

Robert W. Bower, Jr.
Employer Representative

Amie M. Parker
Employee Representative