

STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 04-UD-04
Issued: March 30, 2004

MAINE STATE EMPLOYEES)
ASSOCIATION,)
))
Petitioner,)
))
and)
))
COUNTY OF YORK,)
))
Respondent.)

UNIT DETERMINATION REPORT

PROCEDURAL HISTORY

This unit determination proceeding was initiated on October 21, 2003, when Timothy L. Belcher, general counsel of the Maine State Employees Association, Service Employees International Union Local 1989 ("MSEA" or "union"), filed a Petition for Unit Determination and Bargaining Agent Election with the Maine Labor Relations Board ("Board" or "MLRB"). This petition requested, in part, a determination that the following employees of the County of York ("county" or "employer") constituted an appropriate bargaining unit within the meaning of 26 M.R.S.A. § 966 and chap. 11, § 22 of the Board Rules: deputy register of deeds and deputy register of probate. The county filed a timely response to this petition on October 31, 2003. A unit determination hearing notice issued on November 14, 2003.

An evidentiary hearing on the unit determination petition was held by the undersigned hearing examiner on December 4, 2003, at the Board's hearing room in Augusta, Maine. Mr. Belcher appeared on behalf of the union. Timothy J. O'Brien, Esq., appeared on behalf of the county. The union presented as its witnesses: Carol Lovejoy, deputy register of probate, and Claude Dube, deputy register of deeds. The county presented David

Adjutant, county manager, as its witness. The parties were given the full opportunity to examine and cross-examine witnesses and to offer evidence. The parties submitted written closing arguments following the production of the hearing transcript. The arguments for the union and for the county were received by the Board on January 15 and January 16, 2004, respectively.

JURISDICTION

The jurisdiction of the hearing examiner to hear this matter and to make a unit determination lies in 26 M.R.S.A. § 966(1) and § 966(2). The subsequent references in this report are all to Title 26, Maine Revised Statutes Annotated.

EXHIBITS

The following exhibit was offered by the county without objection by the union, and was admitted into the record:

- C-1 Collective bargaining agreement between the County of York and the MSEA (Effective January 1, 2002, to December 31, 2004)

The following exhibits were offered by the union without objection by the county, and were admitted into the record:

- U-1 Job description, deputy register of probate (rev. May 8, 1997)
- U-2 January 6, 1997 memo from Lorraine L. Hutchins to York County Board of Commissioners reappointing Carol Lovejoy Deputy Register of Probate
- U-3 January 10, 2003, letter from Debra L. Anderson appointing Claude Dube Deputy Register of Deeds from January 10, 2003, to December 31, 2006
- U-4 September 24, 2003, letter from Kern to Adjutant
- U-5 October 14, 2003, letter from Adjutant to Kern

STIPULATIONS

The parties agreed to the following factual stipulations on the record:

1. Maine State Employees Association - SEIU Local 1989 (MSEA) is a public employee organization within the meaning of 26 M.R.S.A. § 962(2).
2. The County of York is a public employer within the meaning of 26 M.R.S.A. § 962(7).
3. There is neither a contract bar nor an election bar to MSEA's petition.
4. This petition does not raise the question of whether the unit should include professional and non-professional employees in the same unit, within the meaning of 26 M.R.S.A. § 962(6).

FINDINGS OF FACT

General findings

1. The executive body of the County of York consists of five elected commissioners. The day-to-day operations of county government are overseen by a full-time county manager.
2. The county commissioners created written personnel policies for all county employees. The county commissioners approve the hiring of all county employees.
3. The county government consists of ten departments including emergency management, district attorney, office of the commissioners, treasurer, maintenance, county jail, deeds, probate, sheriff, and communications.
4. Many of these departments are headed by an elected official, such as the district attorney, treasurer, sheriff, register of deeds, and register of probate. Some of these elected officials are empowered by statute to appoint a deputy for their respective departments.
5. Most of the county employees (excluding the elected county

- officials and appointed deputy officials) are organized into five bargaining units for purposes of collective bargaining. These units include: patrol, corrections and communications, corrections supervisory, captains, and a general government unit. The bargaining unit proposed here (government supervisory) would constitute the sixth unit in the county.
6. The general government unit consists of most "line staff" in the following departments: district attorney, deeds, probate, maintenance, treasurer, county jail, and sheriff. The MSEA is the certified bargaining agent for the general government unit.
 7. The MSEA and the county have negotiated a total of two collective bargaining agreements for the general government unit. The negotiating team for the county for both agreements consisted of one of the commissioners (William Layman) and the county manager.
 8. The current collective bargaining agreement for the general government unit is effective from January 1, 2002, to December 31, 2004. This agreement was negotiated at the end of 2001 and signed on March 6, 2002.
 9. All full-time positions in the deeds office and the probate office (except for the register and deputy register) are in the general government unit.
 10. Most county employees, including the deputy register of probate and deputy register of deeds, work in the York County Courthouse building.

Findings regarding the deputy register of probate

11. The business of the county probate office is to process legal matters relating to wills, estates, adoptions, guardianships, and conservatorships. The office also facilitates hearings and other matters before the probate judge.

12. The probate office consists of the probate judge, the register of probate, the deputy register of probate, five full-time probate employees, and two temporary employees.
13. The register of probate is an elected position, serving four-year terms.
14. The register of probate functions as the head of the probate office. The register recommends new probate office employees for hire, with final approval by the commissioners. The register supervises all employees in the probate office, reviews work of the probate office employees, prepares a budget for the office, and approves purchases for the office. The register of probate also serves as clerk for the probate judge. In consultation with the probate judge, the register of probate creates any necessary office procedures, not already prescribed in law, rule or the county personnel policies.
15. The register of probate is empowered by statute to appoint a deputy register of probate. In the absence of the register of probate, the deputy register of probate is expected to fulfill the duties of the register.
16. The register of probate supervises the deputy register of probate. The probate judge also supervises and directs the deputy register of probate in some matters.
17. When the register of probate appoints a deputy register of probate, the register of probate informs the county commissioners of the appointment as a matter of courtesy. The commissioners do not appoint the deputy register of probate to the position, nor do they confirm the appointment.
18. The deputy register of probate acts, along with the register, as the supervisor of the employees in the probate office. The deputy register of probate also performs some of the same "front line" work as the other probate

employees. The register of probate consults with the deputy register about matters relating to personnel and the administrative functioning of the office.

19. The most recent job description for the deputy register of probate position is accurate (Exh. U-1).
20. The present deputy register of probate has been employed as a county employee since 1980. She was first appointed to serve as the deputy register of probate from 1981-1984. She was reappointed to this position in 1989, and has served as the deputy register of probate from that time to the present.
21. The deputy register of probate was last appointed to her position by a previous register of probate on January 1, 1997 (Exh. U-2). This appointment consisted of a statement signed by the deputy register of probate, sworn before a dedimus justice. This appointment contained no termination date.
22. The present register of probate began serving in elected office on January 1, 2001. Her term expires on December 31, 2004. The present register of probate did not specifically reappoint the deputy register of probate to office. The deputy register of probate continues in this position (apparently) pursuant to her appointment by the previous register which contained no expiration.
23. There has been considerable controversy surrounding the present register of probate. In late 2001, the probate judge gave some of the duties of the register of probate to the deputy register because he believed the register of probate was not properly performing these duties. The probate judge also ordered the deputy register of probate to receive a salary increase from the deputy register salary (about \$36,000 per year) to the register salary (about \$45,000 per year). There is a continuing legal controversy

about the probate judge's authority to make these changes. However, since January, 2002, the deputy register has performed the increased duties and the county has paid her the increased salary.

24. The register of probate has been completely absent from her position since April 22, 2003, and it is unknown whether or when she will return to her position. Since this date, the deputy register of probate has performed many of the duties of the register and been paid the salary of the register, although still retaining the title of deputy register of probate. Some of the duties that the deputy register of probate normally performs have been distributed to other employees in the probate office.
25. Due to the continuing absence of the register of probate, the deputy register of probate has been required to perform many of the register's managerial and supervisory functions. For instance, the deputy register of probate has been approving leave requests and time sheets. She has dealt with employee conflicts. She presented a request to the commissioners to hire a temporary employee for the office. She consulted with the county manager about how to post and fill this temporary position in accordance with the collective bargaining agreement.
26. Due to the continuing absence of the register of probate, the deputy register of probate was required to complete the 2003 and 2004 budget for the probate office, in consultation with the probate judge. She created the budget by utilizing past budgets and reviewing the collective bargaining agreement to determine the required salary increases for probate employees. The probate judge suggested a two percent increase in salaries for the judge, the register of probate, and the deputy register of probate, which was put into the budget.

27. Neither the register of probate nor the deputy register of probate were involved in any way in negotiating the two collective bargaining agreements for the general government unit, nor did they have any significant role in the collective bargaining process. Both the register of probate and the deputy register of probate are expected to be familiar with the unit's collective bargaining agreement, in order to properly administer the agreement and supervise the employees covered by the agreement.
28. Some grievances have been filed by probate office employees, but the deputy register of deeds has had no involvement in processing or responding to these grievances.

Findings regarding the deputy register of deeds

29. The business of the county deeds office is to be the repository for all deeds and other documents related to real estate that are recorded in the county, and to handle all related legal matters.
30. The deeds office consists of the register of deeds, the deputy register of deeds, 12 full-time deeds employees, and one part-time deeds employee.
31. The register of deeds is an elected position, serving four-year terms.
32. The register of deeds functions as the head of the deeds office. The register recommends new deeds office employees for hire, with final approval by the commissioners. The register supervises all employees in the deeds office, performs the employee evaluations, prepares a budget for the office, and approves purchases for the office.
33. The register of deeds is empowered by statute to appoint a deputy register of deeds. In the absence of the register of deeds, the deputy register of deeds is expected to fulfill the duties of the register. The register of deeds

- supervises the deputy register of deeds.
34. When the register of deeds appoints a deputy register of deeds, the register of deeds informs the county commissioners of the appointment as a matter of courtesy. The commissioners do not appoint the deputy register of deeds to the position, nor do they confirm the appointment.
 35. The deputy register of deeds acts, along with the register, as the supervisor of the employees in the deeds office. The deputy register of deeds also performs some of the same "front line" work as the other deeds employees. The register of deeds consults with the deputy register about matters relating to the functioning of the office. For instance, the register of deeds sought the advice and assistance of the deputy register in the recent purchase of a new computer system for the office.
 36. The present deputy register of deeds has been employed by the county since 1995. He has been appointed to consecutive terms in the deputy register position, without break in service, since that time.
 37. The register of deeds who was elected to serve through December 31, 2002, was sick for much of her last year in office and eventually died about six months before her term was to have ended. During her illness, the deputy register functioned in her place for extensive periods of time. In the last six months of 2002 (after the death of the register), the commissioners appointed the deputy register as the acting register to complete her term of office.
 38. A new register of deeds was elected to begin a term of office on January 1, 2003. This new register reappointed the deputy register to his position by written appointment dated January 10, 2003 (Exh. U-3). This appointment consisted of a statement signed by the deputy register of deeds, sworn before a dedimus justice. This appointment

document specified that his appointment term will expire on December 31, 2006, which corresponds to the elected term of office for the register of deeds.

39. Since the new register of deeds has been elected to office, she has been absent at times from work due to a death in her family, and other family and work-related matters. She has been away from work for about four to six weeks in the last year. During these periods, the deputy register of deeds has functioned in her place as necessary.
40. Neither the register of deeds nor the deputy register of deeds were involved in any way in negotiating the two collective bargaining agreements for the general government unit, nor did they have any significant role in the collective bargaining process. Both the register of deeds and the deputy register of deeds are expected to be familiar with the collective bargaining agreement, in order to properly administer the agreement and to supervise the employees covered by the agreement.
41. The deputy register of deeds has no role is responding to any grievances filed by employees of the deeds office. At one point in 2003, the register of deeds advised the deputy register that an employee had filed a grievance about some supervisory conduct of the deputy register, but the deputy register had no involvement in the processing of the grievance.
42. The deputy register of deeds has helped the register in creating the yearly budget for the office. The deputy register created the budget himself during the period of time when the former register of deeds was sick and subsequently died. During those years when a collective bargaining agreement had not yet been negotiated, the county manager gave the deputy register a range of possible wage increases in order to create the budget. The deputy

register was not advised that this information was to be kept confidential.

Other findings relating to community of interest factors

43. The probate office and the deeds office are on different floors of the York County Courthouse. The deputy register of probate and the deputy register of deeds have personal or telephonic contact on average one or two times per week. For instance, the deputy register of probate may need to have questions about real estate answered relating to a will and contact the deputy register of deeds with this question. The deputies of the two offices have also conferred about the budgets for their respective offices.
44. The positions of the deputy register of probate and the deputy register of deeds perform similar functions in their respective offices. Each position must perform "line staff" tasks and some supervision of office employees. Each position is empowered to act in the absence of the register of each office.
45. The positions of the deputy register of probate and the deputy register of deeds require similar office and supervisory skills (ability to perform clerical tasks, ability to perform accurate research, ability to communicate effectively, ability to work with attorneys and the public, and the like). The positions require a different base of knowledge (probate law versus real estate law).
46. The terms and conditions of employment of the two positions are similar. The deputy register of probate would, under normal circumstances, be paid about \$1000 per year more than the deputy register of deeds in light of her longevity. However, the deputy register of probate is currently paid about \$10,000 per year more due to the continuing and complete absence of the register of probate.

47. As county employees, the terms and conditions of employment of the deputy registers are determined by the county commissioners. They are both subject to the same personnel policies created by the commissioners. If either deputy register wanted a raise in salary, for instance, the deputy register would need to seek approval from the register. The register would need to forward the request and have the request approved by the county commissioners.
48. Both incumbents to these positions wish to be in a bargaining unit together, with MSEA as the bargaining agent.

DISCUSSION

The county argues that both positions in the proposed unit (the deputy register of probate and the deputy register of deeds) are excluded by statute from the definition of public employee. Specifically, the county argues that the deputy registers are "confidential" employees within the meaning of § 962(6)(C) or that they are "department heads" within the meaning of § 962(6)(D). The county also argues that, if the two positions are not excluded by statute from the definition of public employee, the positions do not share a community of interest, within the meaning of § 966(2) and chap. 11, § 22(3) of the Board Rules. These issues will be addressed, in turn, below.

Whether the deputy register of probate or the deputy register of deeds is a department head

The county argues that both deputy registers are "department heads," and therefore not "public employees" within the meaning of the MPERLRL. Section 962(6)(D) provides that "public employee" means any employee of a public employer, except any person:

- 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.

The exception, by its own terms, requires that the employee must be appointed by the executive head or body of the employer, that the appointment must be made pursuant to statute, ordinance or resolution, and that the appointment be for an unspecified term. In addition, the employee's 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 the deputy registers were appointed in keeping with the language of the exception.

A review of state law makes clear that the York County Commissioners constitute the "executive body" of the county. 30-A M.R.S.A. § 101 provides that the commissioners' duties include allowing and settling all receipts and expenditures for the county, representing the county, managing the property and the business of the county, and all related duties. 30-A M.R.S.A. § 102 provides that the county commissioners have final authority over the operation of all county offices by elected or appointed county officials (except where a county personnel board has been established). In a recent case, Town of Topsham and IAMAW, No. 02-UCA-01 (MLRB Aug. 29, 2002), the Board conducted an extensive review of the state Town Manager Plan in order to determine whether an appointment made by a town manager alone was an appointment made by the "executive head" of the town. The Board concluded that towns organized under the Town Manager Plan have an executive body (the board of selectmen) that shares its executive authority with the executive head (the town manager). County commissioners are empowered to appoint a county manager under 30-A M.R.S.A. § 82 (as the York County Commissioners have done). The county manager is the chief administrative official of the county and, functioning much the same as a town manager in towns organized under the Town Manager Plan, is responsible for the administration of all departments and offices controlled by

the county commissioners. Thus, there is little question that with the guidance provided by Town of Topsham, the county commissioners are the executive body of the county and (while not pertinent to this matter) that they share this authority with the executive head, the county manager.

Both deputy registers are, by law, appointed by their respective registers, who are both elected officials. See 18-A M.R.S.A. § 1-506; 33 M.R.S.A. § 605. The county commissioners, the executive body of the county, do not appoint the deputy registers. The county concedes this, but also argues that the county commissioners confirmed the appointments of the deputy registers in some manner. Neither the law nor the evidence presented in this matter supports this argument, however. The county commissioners must approve or confirm the employment of all county employees per 30-A M.R.S.A. § 501. However, neither statute relating to the appointment of the deputy registers requires that such appointments be confirmed by the county commissioners, or by any other body. When the present incumbents in the deputy register positions were appointed as deputy registers, their respective registers made the appointments. The appointment papers consisted only of the appointment by the register, and the sworn statement made by each deputy register before a dedimus justice (Exhs. U-2, U-3). In the case of the deputy register of probate, the register of probate informed the county commissioners of the appointment by memo (Exh. U-2). There was no documentary evidence of confirmation by the county commissioners of either appointment.

The county relies on one piece of testimony given by the county manager in arguing that the deputy registers were confirmed by the county commissioners:

Q. Now, after those appointments are made by the respective registers, what if any action or involvement is there with forwarding that information and action

upon it by the county commissioners?

A. It's more involvement than action because by statute the register does have the authority to appoint his or her deputy, and it is ordinarily presented to the commissioners by way of information as a courtesy that I, as a register of probate, have appointed Carol Lovejoy as my deputy. So it becomes pro forma that it's an after-the-fact confirmation, and the commissioners' only involvement thereafter, other than acknowledging the appointment by the register, is to make sure that the compensation is appropriate for that of the deputy treasurer--deputy register.

Tr. at 132.

While the county manager used the term "after-the-fact confirmation" in his testimony, it is clear from his overall testimony and the remainder of the evidence that the county commissioners were simply informed of the appointment of the deputy registers after the appointment occurred. This was not a "confirmation" in the normal sense of that word, nor was it a "resolve" or some other act that met the "degree of importance and formality needed to satisfy the Act's [appointment] requirement." Teamsters Local Union No. 48 and City of Saco, No. 80-UD-34, slip op. at 5 (MLRB June 20, 1980). The Board has long held that there must be some greater significance or formality to an appointment than is the case with the general hiring process. Maine Maritime Academy and MSEA, No. 03-UCA-01, slip op. at 7 (MLRB May 15, 2003); Teamsters and City of Presque Isle, No. 92-UD-10, slip op. at 21 (MLRB Aug. 18, 1992). Here, the deputy registers were clearly appointed by elected officials, not by the executive head or body of the county. Therefore, neither deputy register can be considered a department head since the exception requires appointment by the executive head or body

of the public employer.¹

The county makes several interesting arguments for a creative reading of the MPELRL which would exclude a department head who is appointed by an elected official from the definition of public employee (county's brief at 16-18). The Board has found, however, that the MPELRL is a remedial statute that must be liberally construed to effectuate the purpose of the Act; to wit, the right of public employees to join labor organizations of their own choosing and be represented by such organizations in collective bargaining. It is well established that exemptions from coverage under the Act must be narrowly construed. State of Maine and MSEA, No. 82-A-02, slip op. at 6 (MLRB June 2, 1983) (Interim Order). Therefore, the hearing examiner is constrained to apply the department head exception as it is written, unambiguously, in the law.

Even assuming *arguendo* that the deputy registers were somehow appointed by the county commissioners, the exception also requires that the deputy registers function as department heads. In interpreting the § 962(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 a department head must be in managing and directing the affairs of the department, in an

¹On the issue of confirmation, this matter is similar to Town of Topsham and IAMAW, No. 02-UCA-01 (MLRB Aug. 29, 2002), where the Board refused to exclude the town clerk as a department head. In that case, the Board found that the Town Manager Plan required that department heads, if appointed by the town manager, be confirmed by the board of selectmen. The Board further found that the town presented no evidence that the board of selectmen confirmed the town clerk. In the present matter, there is no requirement in law that deputy registers be confirmed by the county commissioners in their positions as deputy registers **and** no proof that the deputy registers were so confirmed by the county commissioners.

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. at 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 (MLRB April 11, 1984).

_____It is also important to distinguish duties of an administrator or a department head from duties as a supervisor. Under the MPELRL, department and division heads are excluded from collective bargaining but supervisors are not. Since supervisors have collective bargaining rights, the supervisory criteria

provided in § 966(1) cannot be determinative of whether an employee is a department head and therefore excluded from collective bargaining. Teamsters Local No. 48 and Boothbay Harbor Water System, No. 82-UD-29, slip op. at 7 (MLRB May 11, 1982). Stated another way, a true department or division head does not simply coordinate, oversee and supervise a program. Bangor Education Ass'n and Bangor School Committee, No. 80-UC-02, slip op. at 8 (MLRB Nov. 16, 1979).

Here, the county does not seem to argue that the deputy registers are department heads when they are functioning in their role as a deputy. The registers are the department heads and the deputy registers serve, essentially, as second in command. A review of the job description for the deputy register of probate, for instance, confirms this. The job of the deputy register entails a variety of "front line" tasks (preparing deposits, docketing, preparing folders for hearing day, providing assistance to attorneys and the public, etc.). The job of the deputy register also involves *de facto* supervision of other department employees. There is no written job description for the deputy register of deeds, but his testimony supported a finding that his job duties are similar to the job duties of the deputy register of probate. When the deputy registers are functioning in their role as deputy, there is little doubt that they are not department heads; they perform the day-to-day work of the department and they supervise, but their primary responsibility is **not** that of managing or directing the affairs of the department. The registers of deeds and probate have this as their primary responsibility.

The county argues, however, that the deputy registers are required to act in the place of the registers when they are absent. Both 18-A M.R.S.A. § 1-506 and 33 M.R.S.A. § 605 provide that in the case of absence or vacancy, the deputy register

effectively acts in the place of the register. For instance, the deputy register of deeds has acted in the place of the current register of deeds when she has been absent due to a death in the family, or due to her attendance at conferences. The deputy register of probate has acted in the place of the current register of probate under much more unusual circumstances--the probate judge found the register of deeds to be unable or incapable of performing her usual tasks and so has assigned most of them to the deputy register. Further, the register of deeds has been entirely absent from her job since April, 2003, and the deputy register has served in her place since that time. It is completely unknown whether or when the register of probate will return to her position (her elected term expires on December 31, 2004). The county therefore argues that the deputy registers (but particularly the deputy register of probate) have effectively served as the department head of their respective departments.

In determining whether a position should be excluded from the definition of public employee, the hearing examiner must look to the actual job duties of the position, not speculative duties or duties that the employer has planned for the position to perform in the future. MSAD No. 14 and East Grand Teachers Ass'n, No. 83-A-09, slip op. at 9-10 (MLRB Aug. 24, 1983); Dept. of Public Safety and MSEA, No. 83-UC-45 and 91-UC-45, slip op. at 17 (MLRB Feb. 4, 1994). This same rationale should apply to duties which are not inherent to the position, but which an employee may perform at times, and on a temporary basis. Under normal circumstances (such as is the case of the deputy register of deeds), it is reasonable to assume that a deputy register may be called upon to act in the place of the register for a total of several weeks out of every year. This might entail signing documents, going to meetings normally attended by the register,

or taking on a larger supervisory role for the staff in the register's absence. This does not convert the deputy register position into the register position. The job of managing and directing the affairs of the department continues to rest with the register of deeds even if, for example, the register goes on vacation or takes a leave due to other personal reasons.

The deputy register of probate is in a different and unique situation. Because of the probate judge's redistributing of the register's job duties and because of the extensive (and continuing) absence of the register, the deputy register has been handling all matters that the register would normally handle for nearly one year. Since the total absence of the register, the deputy register has been effectively functioning as the department head, while still retaining the job title of deputy register. On the other hand, this situation must be considered temporary as the register could return to her position at any time. Further, the register's term expires at the end of this year. The Board has found that assigning an employee on a temporary basis to an excludable position does not justify excluding that employee's normal or original position from a bargaining unit. Maine Dept. of Public Safety and MSEA, No. 83-UC-45 and 91-UC-45, slip op. at 28 (MLRB Feb. 4, 1994), aff'd, No. 94-UCA-01 (MLRB July 1, 1994); Maine Dept. of Transportation and MSEA, No. 83-UC 36, slip op. at 42 (MLRB Apr. 11, 1986) (applying this principle to temporary assignments lasting as much as one year). To consider only this particular employee's unique and temporary situation would be in error as the focus in a unit determination hearing should be on the position itself. Focusing on the positions in question, neither deputy register functions as a department head.

In conclusion, neither the deputy register of deeds nor the deputy register of probate is a "department head" as defined in

§ 962(6)(D) as neither position is appointed by the executive head or body of the employer, and neither functions as the head of their respective departments.

Whether the deputy register of probate or the deputy register of deeds is a confidential employee

The county also argues that both deputy registers are "confidential" employees and therefore not "public employees" within the meaning of the MPELRL. Section 962(6)(C) provides that "public employee" means any employee of a public employer, except any person:

C. Whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to the executive head, body, department head or division head.

The exception for a confidential employee is not intended to exclude all employees with access to information considered "confidential" in other contexts. The Board has held:

Our standard for the exclusion of 'confidential' employees is that those persons affected are employees who are 'permanently assigned to collective bargaining or to render advice on a regularly assigned basis to management personnel on labor relations matters.' State of Maine and Maine State Employees Association, [Report of Appellate Review of Unit Clarification Report (Mar. 2, 1979)], at 8. As we have noted above, the 'labor relations' matters, in the foregoing context, do not include contract administration actions or duties. Applying Hendricks County, [454 U.S. 170, 102 S.Ct. 216, 70 L.Ed.2d 323 (1980)], to this context, those employees who have, as part of their work responsibilities, access to the employer's negotiations positions, in advance of said positions being disclosed at the bargaining table, and who, as an integral part of their job duties, assist and act in a confidential capacity with respect to persons who formulate or determine the employer's bargaining positions or bargaining strategy are 'confidential' employees

State of Maine and Maine State Employees Association, No. 82-A-02, slip op. at 10 (MLRB June 2, 1983)(Interim Order). The purpose of this exclusion is to avoid situations where employees would be faced with conflicts in loyalty in the collective bargaining context between that owed to the employer and that owed to the bargaining agent. The potential of such a conflict may arise with employees who, as an inherent part of their job duties, have access to the employer's collective bargaining positions and strategies before they are presented at the bargaining table. These collective bargaining ideas, policies or positions, "if disclosed to the bargaining agent, could provide the bargaining agent with unfair leverage or advantage over the public employer." Town of Fairfield and Teamsters Local Union No. 48, No. 78-A-08, slip op. at 3 (MLRB Nov. 30, 1978).

In addition, the Board has held that "[i]n many if not most cases, 'confidential' supervisory employees need access to at least one 'confidential' clerical employee, in order to carry out their 'confidential' duties." State of Maine and Maine State Employees Association, No. 82-A-02, slip op. at 28. However, not all confidential supervisory employees utilize or need to utilize such a confidential clerical, particularly with the present state of technology. As a hearing examiner has more recently suggested regarding the Board's position on the need for confidential clerical assistance:

The Board's position . . . is a statement of fact rather than a statement of policy. It is simply a recognition that confidential supervisory employees may need a confidential clerical support person. It does not suggest that the confidential supervisory employee has any particular entitlement to a confidential clerical support person.

Lewiston Food Service Managers Association/MEA/NEA and Lewiston

School Committee, No. 99-UD-10, slip op. at 24-25 (MLRB May 27, 1999).

The core of the confidential exclusion is the employee's participation in the collective bargaining process and/or access to the employer's collective bargaining positions, strategies, and information. The deputy registers here have no confidential role in the collective bargaining process. The general government unit currently represented by MSEA (which includes most front line positions in the deeds and probate office, as well as other county employees) has negotiated two collective bargaining agreements with the county, the most recent effective January 1, 2002, to December 31, 2004. The county's negotiating team for both agreements consisted of the county manager and one of the county commissioners. Neither of the registers were on the bargaining team, nor did they have any real involvement in developing strategies or bargaining positions so as to have access to confidential information. The role of the registers was limited to a briefing on the details of the agreement after it had already been negotiated. As the registers were not utilized in a confidential capacity, as that term has been defined by the Board, even more attenuated were the roles of the deputy registers in the collective bargaining process.

The county specifically argues that the deputy registers were involved in the budget process for their respective offices and thus were privy to the county's position on future salary increases or a range of future salary increases. Both deputy registers have helped their registers in creating a budget for their respective offices. Due to the recent absence of the register of probate, the deputy register of probate was heavily involved in creating the budget for both 2003 and 2004. In most years, however, the budget was created using wage increases already established in existing collective bargaining agreements

(Tr. at 19, 47, 94). This is not "confidential" information, even in the usual meaning of that term. In at least one instance, prior to the ratification of the current collective bargaining agreement, the registers and the deputy registers were given a salary target or range with which to work in creating the budget. This is summarized in the following testimony of the deputy register of deeds:

Q. Now, let's focus upon your role within the budgetary process. As I understand it, you have been active in assisting the various registers of deeds in the preparation of the budget?

A. Yes.

Q. Okay. And that has been happening for a number of years?

A. Yes.

Q. Right. And so even going back five, six years from the present, you were actively involved in that?

A. Yes.

Q. Right. In the course of that time period then you were--you were made privy to the different monies potentially being set aside for wages for employees in the prospective calendar year, is that right?

A. It's done by contract, yes.

Q. Right. But there was a time period in which there was no contract in place during your tenure, is that right?

A. We were given--we were given by the commissioners, David the county manager would give us a percentage and that's what we would use.

Q. Okay. And so, you know, going back to the time period that the first collective bargaining agreement was negotiated, at that point in time they gave you ranges that they wanted you to operate within for putting together your budget for your staff office.

A. Yes.

Q. Is that right? And similarly at the time of the negotiation of the most recent contract in the fall of 2001, at that same time they gave you the range that they were projecting that they wanted to fall within for the upcoming year with the new contract, is that right?

A. Yes.

Q. And so they gave you access to the financial information about what they were projecting the wages

to be.

A. Yes.

Tr. at 94-95.

It is not at all clear to the hearing examiner that this type of projected salary target or range is a piece of "confidential" negotiation information. At most, it was a guess as to what salary increases, or range of increases, might ultimately be negotiated for the employees simply so that a budget could be submitted in a timely fashion before the agreement was ratified. Further, the county budget process is not shrouded in secrecy. See 30-A M.R.S.A. § 833. The county manager testified that he did not advise the deputy register that such information was confidential, or that it could not be shared with anyone. Tr. at 149. Access to such limited information on such an infrequent basis did not make either deputy register a confidential employee. Cf. State of Maine and MSEA, No. 82-A-02, slip op. at 13-14 (the role of chief of data processing and systems as the exclusive employee providing costing data for proposals during bargaining is the type of significant though infrequent duty that justifies exclusion as a confidential employee).²

In addition to the relevant collective bargaining agreements, the county commissioners have created all personnel policies for county employees. The county manager is effectively

²The county appears to be arguing that this prospective salary target or scale was given on a number of occasions to the deputy registers. For instance, the county manager testified that he gave this type of wage information to "registry of deeds and the registry of probate" at times prior to 2003, and that he gave this type of wage information to the deputy register of probate in 2003 (due to the absence of the register). Tr. at 140. In 2003, however, the current collective bargaining agreement was in effect and the salaries would have been based upon the negotiated agreement, not upon any confidential information. The providing of a salary target or scale was therefore most logically done prior to the current agreement being negotiated, sometime in 2001, and not on numerous occasions.

the chief administrator for the county on personnel matters on a day-to-day basis. Neither deputy register is permanently assigned to "render advice on a regularly assigned basis to management personnel on labor relations matters." State of Maine and MSEA, No. 82-A-02, slip op. at 6-7. Not even the registers of the probate and deeds offices are so assigned; therefore, it is irrelevant that the deputy registers sometimes act in the place of the registers.

Both deputy registers perform many other duties commensurate with their supervisory roles, and such duties increase when either deputy register acts in the place of the register. These duties include writing employee evaluations, recommending the redistribution of duties amongst employees, recommending the need for additional staff, and ensuring that vacancies are filled in compliance with the collective bargaining agreement. However, all of these duties fall squarely within the parameters of administering the contract and the personnel policies of the employer, which are beyond the scope of the confidential exception. The Board has found repeatedly that contract administration duties do not make an employee a confidential employee. State of Maine and Maine State Employees Association, No. 82-A-02, slip op. at 25, 27 (handling of grievance files, maintaining personnel files, handling worker's compensation claims, maintaining seniority lists and sick time records are not confidential functions); State of Maine and MSEA, No. 78-A-09, slip op. at 7-8 (MLRB Mar. 2, 1979) (captains and lieutenants in state police are not confidential employees; they are supervisors and contract administrators, but not collective bargaining or labor relations advisors to the bureau); AFSCME and Town of Sanford, No. 92-UD-03, slip op. at 37-38 (MLRB Feb. 21, 1992), aff'd, No. 92-UDA-03 (MLRB May 7, 1992) (performing general supervisory and management duties and providing information about

matters to be addressed in collective bargaining agreement insufficient for confidential designation).

Most of the employer's arguments for finding the deputy registers to be confidential employees actually relate to the supervisory duties of the deputy registers. The employer is naturally concerned that the registers be free to confide in their deputy registers about personnel matters, and that the deputy registers be free of conflict in acting as supervisors. However, these types of concerns have been addressed by the creation of a separate supervisory unit, not by finding that supervisors are confidential employees.³ Keeping a bargaining unit of supervisors separate from their subordinate employees can act to minimize conflicts of interest between supervisors and subordinate employees and to lessen conflicts of loyalty for supervisors between the duty to their employer and allegiance to fellow unit members. Town of Kennebunk and Teamsters Local Union No. 48, No. 83-A-01 (MLRB Oct. 4, 1982) (affirming the creation of a police supervisory unit consisting of lieutenants and corporals); Teamsters Local Union No. 48 and Boothbay Harbor Water System, No. 82-UD-29 (MLRB May 11, 1982) (creating a supervisory unit consisting of water system foreman). As the

³The supervisory criteria contained in Sec. 966(1)--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--are set forth in order to facilitate the formation of bargaining units composed entirely of supervisory personnel. Town of Kennebunk and Teamsters Local Union No. 48, No. 83-A-01, slip op. at 5 (MLRB Oct. 4, 1982). The Board has specifically equated supervisory duties with contract administration duties (and therefore those duties which do **not** contribute to a finding that the employee is a confidential employee). State of Maine and MSEA, No. 82-A-02, slip op. at 7.

union here is petitioning for a separate bargaining unit for the supervisors, such concerns of the employer have been addressed. These concerns are simply inapposite to the issue of whether these supervisory employees are confidential employees.

In conclusion, neither the deputy register of deeds nor the deputy register of probate is a "confidential" employee as defined in Sec. 962(6)(C) as neither position is permanently assigned to collective bargaining or to render advice on a regularly assigned basis to management personnel on labor relations matters.

Community of Interest

Having found that the deputy registers are not excluded from the definition of "public employee" under the MPELRL, the issue remains whether the two positions share a community of interest. 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 (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. It is well established that the hearing examiner's duty is to "determine whether the unit proposed by the petitioner is an appropriate one, not whether the proposed unit is the most appropriate unit." Town of Yarmouth and Teamsters Local Union No. 48, No. 80-A-04, slip op. at 4 (MLRB June 16, 1980). The employees' right to self-organization is best protected when their judgment on the appropriate unit is respected, as long as the positions share the community of interest required by § 966(2). Portland Administrative Employees Ass'n and Portland Superintending School Committee, No. 86-UD-14, slip op. at 28 (MLRB Oct. 27, 1986), aff'd, No. 87-A-03 (MLRB May 29, 1987).

With this guidance in mind, the hearing examiner will

address the community of interest factors, in turn, below.

(1) Similarity in kind of work performed. The work of the two deputy registers differs on a day-to-day basis because the basic functions of the probate office and the deeds office differ. Because the probate office is connected directly to the probate court, the register and deputy register of probate are called upon to prepare matters for court (docketing, filing, etc.). In many basic ways, however, the deputy registers function in a similar capacity in their respective offices. Both perform various front-line functions in their offices, handling various documents and legal filings, answering questions, and dealing with the public. Both are supervisors in their offices, addressing questions for subordinates and performing other supervisory tasks, especially when such tasks are not performed by the registers. Both may act in the place of the registers in their absence.

The Board has recognized that "similarity of work" does not mean identical work. As the executive director has noted in a previous decision, Auburn Education Ass'n/MTA/NEA and Auburn School Committee, No. 91-UD-03, slip op. at 11 (Feb. 27, 1991):

In comparing the nature of the work being performed by the various classifications under consideration, the essence or basic type of the functions being performed is far more important than the details of each position's work responsibilities. Inherent in the existence of separate job classifications is a difference in the specific work assignment of each classification; however, such differences do not preclude the inclusion of various classifications in the same bargaining unit.

Bargaining units with very diverse individual positions have been approved, as long as the positions have some commonality (such as supporting the educational process or providing the basic

municipal services for a town).⁴ The county general government unit consists of front-line employees of both the probate and deeds offices, as well as other departments of the County, yet has been able to function as a group and negotiate agreements with the employer. Compared to the work that positions in these types of units perform, the kind of work that the deputy registers of deeds and probate perform is actually quite similar.

(2) Common supervision and determination of labor relations policy. The deputy registers are directly supervised by their respective registers. The deputy register of probate also receives additional supervision from the probate judge in some matters. As both deputy registers are also county employees, however, the terms of their employment are governed by the county commissioners (who act in conjunction with the county manager). The labor relations policy as it relates to the positions is uniform for both positions, based upon county personnel policies. Therefore, ultimate supervision and determination of labor relations policy is common.

(3) Similarity in scale and manner of determining earnings.

The deputy registers are both salaried employees. Both have the same base level of salary, except that the deputy register of

⁴See, e.g., Granite City Employees Ass'n and City of Hallowell, No. 01-UD-04 (MLRB May 23, 2001) (approving unit consisting of deputy city clerk, code enforcement officer, janitor, deputy police chief, police officers, highway foreman, equipment operators and laborer); East Grand Teachers' Ass'n/MTA/NEA and MSAD No. 14 Board of Directors, No. 92-UD-01 (MLRB Oct. 1, 1991) (approving a unit consisting of teachers' aides, school secretaries, the food service director, bus drivers and custodians); Bangor Firefighters Ass'n, Local 772 and City of Bangor, No. 89-UD-06 (MLRB Jan. 26, 1989) (approving the accretion of a mechanic to a unit consisting of firefighters, dispatchers and inspection officers).

probate is paid \$1000 more per year in recognition of her longevity as a county employee. Neither deputy register is paid more when acting in the place of the register when those absences have been of the usual variety (absences of the register based on vacation, family emergency, etc.)

Both deputy registers have been paid the salary of the register under unusual circumstances. The deputy register of deeds was, for a period, the acting register following the death of the register of deeds. The deputy register of probate is now being paid a much higher salary (\$10,000 more per year) due to the continuing and lengthy absence of the register, originally pursuant to an order of the probate judge. However, this situation is inherently temporary and it is the base salaries of the deputy register positions which should be compared. Obviously, both deputy registers may negotiate an increase in salary when they are acting in the place of the registers for lengthy periods of time. Their interests appear to be similar in this regard.

(4) Similarity in employment benefits, hours of work and other terms and conditions of employment. The deputy registers are provided the same benefits and terms and conditions of employment pursuant to county personnel policies. They both have the same hours of work.

(5) Similarity in the qualifications, skills and training. Both deputy registers are required to have different types of knowledge (presumably either through education or training) relevant to the different type of work performed in the probate and the deeds offices. For instance, the deputy register of probate is required to have extensive knowledge of probate laws and court rules and procedures. However, the generalized

qualifications, skills and training required for each job are quite similar. A review of the job description for the deputy register of probate lists a variety of knowledge and skills that are required for either job, such as knowledge of clerical procedures, ability to prepare correspondence and maintain records, ability to research, locate, interpret and apply records information, and ability to maintain effective working relationships with co-workers, the public and attorneys. Apparently, neither position requires any specific college or specialized degree.

(6) Frequency of contact among employees. Both deputy registers work in the same building, on separate floors. They have contact one or two times per week regarding mutual work-related matters (real estate matters connected with probate matters), or they speak over the telephone. They also may speak with each regarding budget issues of their respective departments. Their contact is certainly frequent enough to allow interchange of ideas if they were to be in the same bargaining unit.

(7) Geographic proximity. See discussion in section (6), above.

(8) Collective bargaining history. The positions at issue have never been organized in a bargaining unit. This factor neither supports nor undermines a finding of community of interest.

(9) Desires of employees. Both incumbents have expressed an interest in joining the bargaining unit and engaging in collective bargaining with the county. This factor is weighed heavily (even when other factors do not so clearly support a

finding of community of interest), since the MPELRL directs the Board to insure to employees the fullest freedom in exercising their collective bargaining rights. Auburn School Committee v. Auburn Education Ass'n/MEA/NEA, No. 91-UDA-01, slip op. at 3 (MLRB May 8, 1991).

(10) Extent of organization. All of the regular employees of the deeds and probate offices are, along with various other county employees, in a general government bargaining unit represented by MSEA. There are four other bargaining units for patrol, corrections and communications. Notably, two of these bargaining units are for supervisory employees (corrections supervisory and a captains unit). The proposed unit here would constitute a supervisory unit for general government employees.

(11) Employer's organizational structure. The general government bargaining unit already cuts across various departmental lines in the county's organizational structure. Both deputy registers hold the same level of position within the hierarchy.

In conclusion, most of the factors strongly support a finding that the deputy registers of probate and deeds share a community of interest with each other. Even if this were not so, the hearing examiner would need to give weight to the fact that the proposed unit is a supervisory unit. If the community of interest factors were applied too narrowly, it could be found that the deputy registers share a clearer community of interest with the subordinate employees of their respective offices than with each other (based on similarity of work, supervision, etc.) It must be assumed that the employer would prefer to have the deputy registers in a bargaining unit separate from the bargaining unit of subordinate employees, as the union has petitioned.

ORDER

On the basis of the foregoing facts and discussion and pursuant to the provisions of 26 M.R.S.A. § 966, the following described unit is held to be appropriate for purposes of collective bargaining:

INCLUDED: Deputy Register of Probate and Deputy Register of Deeds.

EXCLUDED: All other employees of the County of York.

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

Dated at Augusta, Maine, this 30th day of March, 2004.

MAINE LABOR RELATIONS BOARD

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.