

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD**

---

IN THE MATTER OF	:	
	:	
STATE OF RHODE ISLAND,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
MANAGEMENT	:	CASE NO: EE-3704
	:	UNIT CLARIFICATION:
-AND-	:	Federal Aid Program
	:	Coordinator (DEM)
	:	
LOCAL 400, IFPTE	:	

---

**DECISION AND ORDER**

**TRAVEL OF CASE**

The above entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board") on the request of Petitioner, Local 400, International Federation of Professional and Technical Employees (hereinafter "Union") to add or accrete the position of Federal Aid Program Coordinator into the bargaining unit at the Department of Environmental Management (hereinafter "Department").

On September 6, 2016, the Union filed a Petition for Unit Clarification in this matter. In accordance with the Board's Rules & Regulations an informal hearing was held on October 5, 2016. Thereafter, an investigative report was completed regarding the Union's request to add the Federal Aid Program Coordinator position to the bargaining unit. A formal hearing was held before the Board on June 27, 2017 where testimony from two (2) witnesses, Veronica Masson and Catherine Sparks, was taken. In addition, fourteen (14) joint exhibits were introduced into evidence at the time of the hearing. Subsequent to the hearing, memoranda of law on the outstanding issues were submitted by each party. On October 6, 2017 the matter was brought before the Board for a Decision and Order. However, as the Board did not have a full complement of members, the final vote on the matter ended in a tie and the matter was dismissed on procedural grounds.

In accordance with the Board's Rules & Regulations, on October 9, 2018, more than one (1) year after the dismissal of the Union's Petition for Unit Clarification, the Union resubmitted its Petition to accrete the Federal Aid Program Coordinator position into the bargaining unit at the Department. The parties stipulated that the information previously submitted to the Board was fully accurate and reflected the respective positions of each party and such information was accepted by the Board. In addition, at the request of the Department, an informal hearing was held on October 25, 2018 so that further information could be added to the record. Both the Employer and the Union were given an opportunity at the informal hearing to provide additional information to the Board.

The re-filed Petition for Unit Clarification states as follows:

The position of Federal Aid Program Coordinator (DEM) has a strong community of interest with her co-workers who are members of Local 400 and identified by EE-3704.

This identical position was filed by Local 400 in September of 2016. An informal hearing was held, an investigative report was issued, and a formal evidentiary hearing was held on June 27, 2017. Both parties filed briefs and on October 5, 2017, the Board denied the accretion because the Board's vote was a 3 to 3 deadlock. The Board was not at full strength, because long time member Frank Montanaro, who had heard the case, had died before the vote. Since neither the Board's rules, nor the State law, contain a mechanism to break the deadlocked vote, the Petition was denied and under the rules, the Petitioner was required to wait until October 7, 2018, one year from the decision, to refile.

As noted above, the transcript, exhibits and memoranda of the parties along with information submitted during the informal hearing on October 25, 2018, have been delivered to the Board. In arriving at the Decision and Order herein, the Board has reviewed and considered all of the above and the arguments contained within each of the post-hearing briefs submitted by the parties.

#### **FACTUAL SUMMARY**

The matter before the Board is the Union's petition to add or accrete the position of Federal Aid Program Coordinator into the bargaining unit it represents at the Department of Environmental Management. For a petition of accretion to be successful, several factors must be demonstrated by the Petitioner: 1) the Petitioner must be able to show that the position it seeks to add to its bargaining unit is a position that is properly included as a part of the bargaining unit, i.e.// the position is not managerial, supervisory or confidential;<sup>1</sup> 2) that the position shares a community of interest with the current members of the bargaining unit to which the Union seeks to add the position. The inability of the Petitioner to either show that the claimed position is appropriate to add to the bargaining unit or that the position does not share a community of interest with the bargaining unit will defeat the petition.

In the instant case before the Board, after careful consideration of the evidence and arguments of the parties, although the decision was a close call, the Board has determined, as discussed in greater detail below, that the position of Federal Aid Program Coordinator is not a managerial and/or supervisory position and it does share a sufficient community of interest with other positions in the bargaining unit at the Department such that the Federal Aid Program Coordinator position should be included as part of the bargaining unit.

---

<sup>1</sup> The Department stipulated during the hearing that the position in question, Federal Aid Program Coordinator, was not a confidential position (See Tr. pgs. 21 – 22).



The Department of Environmental Management consists of two (2) main bureaus, the Bureau of Natural Resources and the Bureau of Environmental Protection. In addition to the two (2) main bureaus, the Department also has three (3) administrative units, the Office of the Director, the Executive Staff, and Divisional Management (See Joint Exhibit #4). The Division of Fish & Wildlife is one of seven (7) divisions within the Bureau of Natural Resources (See Joint Exhibit #4). The Division is headed by Catherine Sparks, Assistant Director for Natural Resources (Tr. pg. 37). The Division is organized into three sections: Freshwater Fisheries, Wildlife and Business Administration (Joint Exhibit #7). The Freshwater Fisheries section is headed by Christine Dudley, Deputy Chief for Freshwater Fisheries, and the Wildlife section is headed by Jason Osenkowski, Deputy Chief for Wildlife. The Business Administration section is headed by Veronica Masson, Federal Aid Program Coordinator (See Joint Exhibit #7). It is the position occupied by Ms. Masson that is the subject of the instant petition.

Two (2) witnesses provided testimonial evidence before the Board in this matter, Ms. Masson, the Federal Aid Program Coordinator, and Ms. Sparks, the Assistant Director for Natural Resources and Ms. Masson's immediate supervisor. Ms. Masson testified that she has worked for DEM in a number of various capacities since 2000 (Tr. pgs. 9 – 10). She testified that she has been performing the Federal Aid Program Coordinator duties since 2010, but has officially been in the position since 2012 (Tr. pg. 9).<sup>2</sup> Ms. Masson testified that her position is within the Division of Fish & Wildlife, which is a part of the Department's Natural Resources Bureau; and that the Division is devoted to protecting and managing the State's natural resources, wildlife fisheries, habitat management, public access for constituents and public access sites (Tr. pg. 10, lines 7 – 14). According to Ms. Masson, the funding for the Division comes mostly from federal dollars (Tr. pg. 10). Ms. Masson described her job, in general terms, as

to help all the people that I work with, the biologists who manage the programs and do the research, get their jobs done using the federal funds that we get from the Fish & Wildlife Service, and there are a lot of restrictions that come along with those funds because of the way they're generated. So, we're required to follow a lot of the federal rules to make sure that the work gets done the way the program is supposed to be done. (Tr. pg. 11, lines 3 – 11).

Ms. Masson further described her role as assisting program leaders in editing the grants that they write and guiding them as far as the federal rules apply to funding issues (Tr. pg. 11, lines 16 – 19). She testified that while the staff and management of the Division determine what grants are to be applied for, the process is mostly driven by the

---

<sup>2</sup> The Federal Aid Program Coordinator title was created in 2012. Prior to that date, according to Ms. Masson's testimony, her current job responsibilities were performed by Najih Lazar (Tr. pgs. 29 – 30). Mr. Lazar performed the duties of the position for approximately four (4) years before Ms. Masson assumed the role (Tr. pg. 24). At the time he performed the duties, Mr. Lazar was a member of the Local 400 bargaining unit (Tr. pg. 24). At the time the Federal Aid Program Coordinator position was created, and Ms. Masson was awarded the position through a desk audit, she was aware that the new title was attached to a non-Union position (Tr. pg. 31).



Deputy Chiefs, the chief of marine and the assistant director (Tr. pg. 12). Ms. Masson also noted in her testimony that all grant applications need to be approved by the grant preparer's immediate supervisor, the Deputy Chief, and by the Assistant Director of the Division (Tr. pgs. 12 – 14). While the importance of grant funding cannot be understated as the Division needs grant funds to support its selected programs, Ms. Masson testified her job, with respect to grant funding, is limited to deciding whether the grants are properly prepared and whether the terms are complied with by the staff (Tr. pg. 14, line 9 through pg. 15, line 11). According to Ms. Masson's testimony, she has no involvement in determining the substance of programs that are supported by the grant funding, instead being concerned with making sure the costs of the program are appropriately made (Tr. pgs. 17 – 18).

As acknowledged by Ms. Masson, her position is on the same line in the organizational chart as the Deputy Chiefs and her pay grade level 32 was, as of the time of the original petition, the same as the Deputy Chiefs (Tr. pg. 18).<sup>3</sup> Ms. Masson operates out of a small section in the business office where she oversees two (2) Fiscal Management Officers (Joint Exhibit #7). Two (2) employees besides the Federal Aid Program Coordinator work in the Business Administration office (Tr. pg. 13). These employees are members of Council 94 (Tr. pg. 13). The primary duties of the employees working in the Business Administration office involve preparing purchase requisitions that assist staff in purchasing whatever goods or items are needed for their jobs (Tr. pg. 13). All requisitions prepared by Ms. Masson's staff must get approval from Ms. Sparks, the Assistant Director (Tr. pgs. 13-14). According to Ms. Masson, the grant application process is similar to the process for preparing the requisitions in that her staff prepares the applications, which are then sent to Ms. Masson for her approval. It is Ms. Masson's responsibility to make sure the grant criteria have been satisfied and the application has been properly prepared (Tr. pg. 14). If that step is satisfied, Ms. Masson signs the approval and sends it on to her supervisor for her approval (Tr. pg. 15).

Personnel below the level of the Deputy Chiefs and Ms. Masson are represented by Unions, either Council 94 or the Petitioning Union (Tr. pg. 46). All the employees below the supervising biologist designation are members of Council 94 (Tr. pg. 16; Joint Exhibits #8 and #9). While Ms. Masson did testify that she signs the timesheets of employees in her area and leave requests for those individuals, those documents are also signed by the Assistant Director (Tr. pg. 27). However, Ms. Masson noted that she has never been involved in disciplining either of the people who report to her, has never been involved in the disciplinary process and has never received training regarding discipline (Tr. pg. 25). Ms. Masson also noted in her testimony that she has not participated in labor relations or employee relations meetings with management and that

---

<sup>3</sup> In August 2017, the Deputy Chief positions in the Department were upgraded from pay grade 32 to pay grade 36. In October 2018, Ms. Masson wrote to Assistant Director Sparks requesting that her position be considered for an upgrade to the same pay grade level as the Deputy Chiefs. According to the Union, Ms. Masson did not receive the upgrade when the Deputy Chiefs were initially upgraded, nor has she received an upgrade from the State as of the end of October 2018 (See Notes of Informal Hearing and Attachments Dated October 25, 2018).



she has never handled a grievance or had training as to how to handle a grievance, has never been involved in labor negotiations and has never received confidential DEM information (Tr. pgs. 21 – 22). While Ms. Masson does use independent judgment within the scope of her job to get work done, she testified that she is not involved in policy decision-making (Tr. pg. 27). Ms. Masson also noted that she approves vacation requests, but that such requests are also approved by the Assistant Director (Tr. pg. 32). According to Ms. Masson, the Assistant Director has never said no to a leave request approved by Ms. Masson (Tr. pg. 32).

Ms. Masson is also responsible for ensuring that the people in her office are at work and at their job when they are supposed to be, that they don't leave early or come in late, and she is responsible to take corrective action if someone comes in late (Tr. pg. 32). While Ms. Masson is responsible for making sure the work performed by the employees in her office gets completed, she testified that the assignment of such work is "kind of self-generated." (Tr. pg. 31, line 24; pg. 32, lines 1 – 3). She is also responsible to intervene if one of the employees in her area was constantly making mistakes (Tr. pgs. 32 – 33).

Finally, Ms. Masson acknowledged during cross-examination that she was involved in the filling of a vacant position. She described her role in the process as one in which she "sat in in the interviews and helped make the decision who was going to be hired." (Tr. pg. 33, lines 7 – 9).

In addition to her responsibilities in overseeing employees in the Business Administration office, Ms. Masson testified that she participates in regular meetings identified as senior staff meetings at the Department (Tr. pg. 20). Ms. Masson testified that in addition to herself and the Assistant Director, other participants in the so-called senior staff meetings are the Deputy Chief for Freshwater, the Deputy Chief for Wildlife and the Supervisor for Freshwater and the Supervisor for Wildlife (Tr. pg. 20, lines 8 – 11). Ms. Masson further testified that supervising biologists, a position that is in the Union, also attend the senior staff meetings (Tr. pg. 20, lines 12 – 16). According to Ms. Masson, the substance of the senior staff meetings is quite broad, encompassing "[e]verything that's going on, probably from soup to nuts, ..." in the Department (Tr. pg. 20, line 21). Ms. Masson also testified she is often asked to give her opinion or answer questions involving whether or not grant money can be expended in a particular area and/or for a particular reason. Ms. Masson noted that her answer to these types of questions is based on whether the request complies with what was set forth or stated in the approved grant and whether it follows federal rules (Tr. pg. 23).

Another part of Ms. Masson's duties requires her involvement in the federal government's auditing process, something that occurs every five (5) years (Tr. pgs. 23 – 24). Basically, it is Ms. Masson's responsibility to make sure that the money from the federal grants is spent in accordance with the terms of the grants so that the Department is in compliance with the appropriation of the money (Tr. pg. 23; pg. 42).

Ms. Masson's job responsibilities also require her to interact regularly with the Deputy Chiefs of Freshwater, Wildlife and Marine, assisting them with any financial questions that may arise regarding particular projects (Tr. pg. 26). Though Ms. Masson testified that she exercises "independent judgment within the scope of [her] job to get the work done," she also noted that she does not make policy or program decisions, nor does she get involved in answering substantive questions regarding policies or programs (Tr. pg. 27). While Ms. Masson is "sometimes involved in discussions" about programs and policies (Tr. pg. 28, lines 1 – 7) and will answer financial questions dealing with the grant applications she oversees, the decisions are made by the Division Chiefs (Tr. pg. 27).

Catherine Sparks, the Assistant Director of Natural Resources in the Department, also testified regarding the duties and responsibilities of the Federal Aid Program Coordinator position. Ms. Sparks testified that as the Assistant Director of Natural Resources since 2012, she is responsible for the leadership of the Division of Forest Environment, the Wildlife Freshwater Fisheries sections, and the business office of the Division of Fish & Wildlife (Tr. pg. 37). According to Ms. Sparks and as it is relevant to the instant Petition, the Division of Fish & Wildlife's main goal is the conservation of wildlife, natural resource protection for wildlife, support for fishing and hunting as legacy conservation activities, land conservation and the protection of natural resources, management of state property and conservation of all species of wildlife (Tr. pg. 40, lines 5 – 16). Ms. Sparks testified about the funding sources for her Division, noting that 75% of the funds come from the federal government and the remaining 25% come from various other resources such as hunting and fishing license receipts, permits and general revenue funds (Tr. pgs. 40 – 41). Ms. Sparks also described the specific federal funding sources, the complexity of receiving and spending the funds and what occurs if the Division is not in compliance with the terms of the federal monies received (Tr. pgs. 42 – 43). Ms. Sparks noted that the federal aid coordinators are responsible for ensuring that the Division is in compliance with all the federal rules regarding the spending of federal money (Tr. pg. 43).

Ms. Sparks verified that she countersigns leave requests initially approved by Ms. Masson. Ms. Sparks indicated that since she is physically "disconnected from staff," the approval process is a way for her to stay informed about the status of personnel and how the staff is doing (Tr. pgs. 44 – 45). Ms. Sparks acknowledged that she reviews the sick time and timesheets and vacation requests, so she knows who is at work and what they are doing (Tr. pg. 45). Notwithstanding this review, Ms. Sparks testified that she does not play an active role in the day to day operational issues of the Department and must rely on supervisors to ensure people are showing up for work and doing their work properly (Tr. pg. 45). Ms. Sparks testified that she considered the Federal Aid Coordinator as part of her management team (Tr. pg. 48). She also described the role Ms. Masson played in running her Division, noting that she (Ms. Sparks) relies on the Deputy Chiefs and Ms. Masson to "discuss, prioritize, look for solutions, ... [and] work on a regular basis,



sometimes separately, but very often together at a round together to prioritize and strategize in terms of goals for the upcoming, the short-term and long-term goals.” (Tr. pg. 50, lines 1 – 7). Ms. Sparks specifically testified that Ms. Masson’s role is largely one of oversight and support for staff in developing projects and programs that are necessary and reasonable within the funding allowed and provided (Tr. pg. 50). Ms. Sparks indicated, that in her view, Ms. Masson played “a big role” achieving consensus and making sure the Division operates appropriately (Tr. pg. 51).

Ms. Sparks also testified that she agreed with Ms. Masson’s testimony during the course of the hearing describing the work that the Federal Aid Coordinator position performs and the work of her business unit (Tr. pgs. 51 – 52). Ms. Sparks noted that Ms. Masson was involved in the filling of a vacant position including preparing the interview questions and making a recommendation for hire to Ms. Sparks with which she (Ms. Sparks) agreed (Tr. pg. 52). Ms. Sparks stated that she would generally defer to the person in the division where the new hire is going as it is that division that has to “live with [the new hire].” (Tr. pg. 53, lines 7 – 15).

Ms. Sparks further testified that Ms. Masson handles disciplinary actions of a lesser degree or at the beginning of the process with more significant discipline being addressed through the Human Resources Department (Tr. pg. 54). In assessing Ms. Masson’s testimony, Ms. Sparks stated that she thought the testimony was “well organized and largely accurate with the exception of minimizing her, what we rely on her for and some creative insights, and that the role in moving forward when things get difficult, I think she plays a larger role than she portrayed.” (Tr. pg. 55, lines 8 – 12).

On cross-examination, Ms. Sparks noted that she is responsible for establishing policy for the Division though she receives input from supervisors (Tr. pgs. 56 – 57). Ms. Sparks also admitted that with regard to policy or policy recommendations, it is not Ms. Masson’s responsibility to initiate those discussions but to assist in implementing policy through the acquisition of funds (Tr. pg. 57). Ms. Sparks also testified that she has delegated signature authority to Ms. Masson within the Division for purposes of signing off on grants, though this action is reviewed by the Assistant Director (Tr. pg. 63).

### **DISCUSSION**

As noted above, in order for the Petitioner to succeed in its request to have the Federal Aid Program Coordinator position accreted to the bargaining unit, it must be able to demonstrate both that the position is one that may be properly included in the bargaining unit, i.e.// it is not a position that is statutorily excluded from the bargaining unit, such as a managerial or supervisory position, and, if it is not an excluded position, that the position shares a community of interest with other bargaining unit positions. In the instant case, the Department contends that the Federal Aid Program Coordinator must be excluded from the unit because it is a managerial and/or supervisory position as those terms are defined and applied under both federal and state labor law and the Rules and Regulations of this Board. The Department also argues that, even if the

position was found to be one that could be included in the bargaining unit, it does not share a sufficient community of interest with the other bargaining unit positions so as to allow the Board to include the position in the unit. The Union, on the other hand, asserts that the position in question, while performing work that is “complex” and “critical to the success of the division’s programs,” (Union Memorandum at pgs. 7 – 8), is neither managerial nor supervisory in nature or scope and, therefore, should not be excluded from the unit. The Board will address each of these issues individually.

Initially, the Department contends that the Federal Aid Program Coordinator position is a managerial and/or supervisory position and should, therefore, be excluded from the bargaining unit. The Union has objected to the Department’s characterization of the position, asserting that the Federal Aid Program Coordinator is neither a managerial nor supervisory position. It is well settled case law that managerial and supervisory personnel are not permitted to Unionize or join existing bargaining units (See *State of RI v. Local 2883, American Federation of State, County & Municipal Employees*, 463 A.2d 186 (R.I. 1983)). The rationale for this exclusion has been expressed by the Rhode Island Supreme Court as follows: “To allow managers and supervisors to participate in the collective bargaining process would be to create a conflict of interest. Managers and supervisors are those who carry out and often help formulate the Employer’s policies.” *Id.*, 463 A.2d at 191; See *Fraternal Order of Police, Westerly Lodge 10 v. Town of Westerly*, 659 A.2d 1104, 1107 (R.I. 1995). This Board’s regulations codify the term “managerial employees” as follows:

Those employees who formulate and effectuate management policies by expressing and making operative the decisions of their Employers. Managerial employees must exercise discretion within or even independently of, established Employer policy and must be aligned with management. An employee may be excluded from a bargaining unit as managerial only if he or she represents management’s interests by taking or recommending discretionary actions that effectively control or implement Employer policy.  
Rhode Island State Labor Relations Board, General Rules & Regulations, 465-RICR-10-00-1-1.2(A)(27).

The above definition follows both State and Federal law regarding the exclusion from bargaining unit membership of managerial employees. See *Fraternal Order of Police, Westerly Lodge 10 v. Town of Westerly*, 659 A.2d 1104, 1107 (R.I. 1995); *NLRB v. Yeshiva University*, 444 US 672, 690 (1980). Thus, an employee may be excluded as managerial only if she represents management interests by taking or recommending discretionary actions that control or implement Employer policy. “Employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if Union membership arguably may involve some divided loyalty. Only if an employee’s activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.” *Id.* at 690.



Similar to the exclusion for managerial employees, the courts have also excluded from inclusion in a bargaining unit, employees who are defined as supervisory. Adopting the definition set forth in the National Labor Relations Act, the Rhode Island Supreme Court defined a supervisor as

Any individual having authority, in the interest of the Employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. *Board of Trustees, Robert H. Champlin Memorial Library v. Rhode Island State Labor Relations Board*, 694 A.2 1185, 1189 (R.I. 1997).

The Board's regulations track this definition of a supervisory employee (See Rhode Island State Labor Relations Board General Rules & Regulations, 465-RICR-10-00-1-1.2(A)(46)). In applying the definition of a supervisor, the United States Supreme Court has approved a three-part test for determining supervisory status. The Court identified the test as follows:

Employees are statutory supervisors if (1) they hold the authority to engage in any [one] of the [twelve] listed supervisory functions, (2) their exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the Employer. *NLRB v. Kentucky River Community Care*, 532 US 706, 713 (2001).

To find that an employee has satisfied the first prong of the Supreme Court's test, a fact finder need only find that the employee has the authority to perform any single one of the twelve (12) enumerated duties. An employee need not actually perform an enumerated duty to satisfy the first prong of the test so long as the employee has the authority to do so for it is the power and not the frequency of its use which is dispositive. See *Beverly Enterprises Virginia, Inc. v. NLRB*, 165 F.3d 290, 294 (4th Cir. 1999). See also *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 360 (1st Cir. 1980). This also includes individuals who possess the authority to recommend any of the duties identified by the Court.

The second prong of the test for supervisory status requires that the employee exercise her authority with independent judgment. Determining whether an individual uses independent judgment in the exercise of functions indicative of supervisory status is an extraordinarily fact intensive analysis. See *Bristol County Water Authority and Teamsters Local Union No. 251*, EE-3636 at pg. 3. To satisfy this test, the employee/claimed supervisor must exercise her authority in a non-ministerial fashion so as to achieve management goals. In other words, the exercise of the independent judgment must be substantive in form and not merely a rote assignment or application. As the United States Supreme Court has stated, "it is certainly true that the statutory term "independent judgment" is ambiguous with respect to the *degree* of discretion required for supervisory status. See *NLRB v. Health Care & Retirement Corp. of America*, *supra*,

at 579. Many nominally supervisory functions may be performed without the “exercise[*e* of] such a degree of...judgment and discretion...as would warrant a finding” of supervisory status under the Act.” (See *Kentucky River*, 532 US at 713) (Emphasis in original). However, it must be emphasized that employees who do not formulate or effectuate the Employer’s policies are generally not viewed as exercising independent judgment (See *State v. Local No. 2883, AFSCME*, 463 A.2d 186, 190 R.I. 1983). Further, the courts have been clear that not every person who gives an order or direction is necessarily a supervisor and not all assignments and directions given by an employee involve the exercise of supervisory authority. See *NLRB v. Yeshiva University*, 444 U.S. 672, 690 (1980); *Neighborhood Legal Services, Inc.*, 236 N.L.R.B. 1269, 1273 (1978); *Board of Trustees, Robert H. Champlin Memorial Library v. Rhode Island State Labor Relations Board*, 694 A.2 1185 (R.I. 1997).

In the third portion of the test, the claimed supervisor must use her authority to promote the interest of her Employer. In describing this standard, the United States Supreme Court has noted as follows: “Consistent with the ordinary meaning of the phrase in the interest of the Employer, the Court has held that acts within the scope of employment or on the authorized business of the Employer are in the interest of the Employer.” (See *NLRB v. Health Care & Retirement Corporation of America*, 511 US at 577, citing *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488 – 489 (1947)).

Even if there is no proof that the Federal Aid Program Coordinator position is managerial and/or supervisory, the Union must still demonstrate that the position shares a community of interest with the current members of the Local 400 bargaining unit in the Department. The Rhode Island Supreme Court noted, in *Rhode Island Public Telecommunications Authority et al. v. Rhode Island State Labor Relations Board et al.*, 650 A.2d 479, 486 (R.I. 1994) “[w]hen determining the membership of units for collective bargaining purposes, the NLRB has as its primary concern the grouping together of “only employees who have substantial mutual interests in wages, hours, and other conditions of employment.”” The Court went on to state that in *N.L.R.B. v. George Groh and Sons*, 329 F.2d 265, 268 (10th Cir.1964) the NLRB established the “community of interest” doctrine, which is used “to determine whether certain employees in a unit are sufficiently concerned with the terms and conditions of employment as to warrant their participation in the selection of a bargaining agent.” *Id.* “In making such a determination, the board is not required to choose the most appropriate bargaining unit, but only an appropriate bargaining unit.” *Rhode Island Public Telecommunications Authority et al. v. Rhode Island State Labor Relations Board et al.*, 650 A.2d at 486, citing *Wil-Kil Pest Control Co. v. N.L.R.B.*, 440 F.2d 371, 375 (7th Cir.1971). Specific factors that are relied upon by the NLRB in determining whether such a community of interest exists have been identified in *N.L.R.B. v. Saint Francis College*, 562 F.2d 246, 249 (3d Cir.1977). The Board has adopted regulations dealing with the community of interest test which follows and codifies State and Federal law. See *Rhode Island Public Telecommunications Authority et al. v.*



*Rhode Island State Labor Relations Board et al.*; and *N.L.R.B. v. Saint Francis College*.

The Board's regulations state:

- "Community of Interest" means the critical consideration in determining the scope of bargaining units. In determining whether a proposed bargaining unit shares a community of interest, the Board may consider the following factors, among other:
- a. The similarity in scale and manner of determining earnings;
  - b. Similarity of employment benefits, hours of work, and other terms and conditions of employment;
  - c. Similarity in the kind of work performed;
  - d. Similarity in the qualifications, skills, and training of the employees;
  - e. Frequency of contact or interchange among employees;
  - f. Geographic proximity;
  - g. Continuity or integration of production processes;
  - h. Common supervision and determination of labor relations policies;
  - i. Relationship to the administrative organization of the Employer;
  - j. The history of the collective bargaining;
  - k. The desire of the affected employees; and
  - l. The extent of Union organization within the Employer's ranks.

In determining whether an accretion of employees to an existing unit is proper, the NLRB considers many of the same factors that determine the community-of-interest question. See *Rhode Island Public Telecommunications Authority et al. v. Rhode Island State Labor Relations Board et al.*, 650 A.2d at 486; *N.L.R.B. v. Security-Columbian Banknote Co.*, 541 F.2d 135, 140 (3d Cir.1976). As our Supreme Court noted, "accretion serves as a mechanism to incorporate a group of employees into an already existing larger unit when such a community of interest exists among the entire group that the additional employees have no separate unit identity and therefore should properly be governed by the larger group's choice of bargaining representatives." *Rhode Island Public Telecommunications Authority et al. v. Rhode Island State Labor Relations Board et al.*, 650 A.2d at 486 – 487.

#### **A. The Managerial Exception**

As discussed above, the Department alleges that the Federal Aid Program Coordinator position is a managerial employee as that term is defined by the case law and this Board's Rules & Regulations (See Department Memorandum at pg. 13). The Union, on the other hand, asserts that the Federal Aid Program Coordinator is not aligned with management and does not make independent decisions that "initiated or recommended any substantive division policy or program." (See Union Memorandum at pg. 10). In short, while the Union acknowledges that the Federal Aid Program Coordinator is "critical to the function and operation of the DEM Fish & Wildlife Division; she is a facilitator of its programs, not a creator of them." (See Union Memorandum at pg. 10). Thus, according to the Union's argument, the inclusion of the Federal Aid Program Coordinator in the bargaining unit "would not create a conflict of interest" nor would it

“obliterate the line between management and labor...” (See Union Memorandum at pgs. 10 - 11); (See also *State v. Local No. 2883, AFSCME*, 463 A.2d 186, 190 (R.I. 1983)).

After careful review by the Board of the testimony, exhibits, memorandum of law, and case law, it is clear to the Board that the Federal Aid Program Coordinator is not a managerial employee as that term has been defined and applied by this Board. There is nothing within the testimony of either Ms. Masson or Ms. Sparks that demonstrates that the Federal Aid Program Coordinator is someone “who formulate[s] and effectuate[s] management policies by expressing and making operative the decisions” of the Department (See Board General Rules & Regulations, 465-RICR-10-00-1-1.2(A)(27)). While the job specifications for the Federal Aid Program Coordinator position indicate that the job is “responsible for a division’s federal grants program management and fiscal matters including budgets, cost accounting, grant in aid, property management and capital improvement initiatives;” (See Joint Exhibit 10), the testimony of Ms. Masson and Ms. Sparks made clear that the responsibility exercised by Ms. Masson in her position was to assist colleagues in using grant money more than to formulate a policy or implement decisions on behalf of the Employer (Tr. pg. 11; pgs. 14 – 15; pgs. 17 – 18).<sup>4</sup> While there is no question that Ms. Masson occupies an important role in the Division of Fish & Wildlife, there is no evidence to suggest that this role represents management or acts on behalf of management as indicated in the Board’s rules or as defined in case law (See *Fraternal Order of Police, Westerly Lodge 10 v. Town of Westerly*, 659 A.2d 1104 (R.I. 1995)). While the Department attempted to point out the necessity of Ms. Masson’s job responsibilities, her use of judgment and her integration into the decision-making of the Department (for example, See Tr. pgs. 34 – 35; Tr. pgs. 62 – 65; Tr. pgs. 66 – 67; Joint Exhibit #10), a review of all the testimony provided indicates that the Federal Aid Program Coordinator’s role is more ministerial than managerial. As Ms. Masson testified, she does not get involved in policy decisions or deciding priorities with regard to Fish & Wildlife issues (Tr. pg. 17). Ms. Sparks confirmed Ms. Masson’s lack of involvement in policy decisions when she acknowledged during her testimony that she (Ms. Sparks) was responsible for establishing policy and the type of programs to implement the policies and she looks to the people who work for her for “support” in the implementation process (Tr. pgs. 56 - 57). Further, as Ms. Sparks admitted in response to questioning regarding the substantive policy or program recommendations that had been made by Ms. Masson, she indicated that it was possible, but could not identify any specific action which Ms. Masson had taken (Tr. pg. 55; pg. 57, lines 8 - 11).<sup>5</sup>

---

<sup>4</sup> Ms. Sparks specifically testified regarding Ms. Masson’s position that “it’s largely that oversight and the support for staff to develop projects and programs that are within that necessary or reasonable category, and I’m going to have such funding.” (Tr. pg. 50, lines 10 – 13). The Board has found nothing in this testimony to support the Department’s contention that the Federal Aid Program Coordinator exercises “independent judgment” to effectuate the policies of management.

<sup>5</sup> Though Ms. Sparks indicated in her testimony that it was her “expectation” that Ms. Masson was involved in “recommending policies” for the Division (See Tr. pg. 58, lines 6 – 16), it is the Board’s view of this testimony that Ms. Masson’s actual involvement as head of the business office was more limited to the ministerial application and use of grant monies to facilitate Division projects (See Tr. pgs. 58 – 59).



Similarly, Ms. Mason's participation in the senior staff meetings did not result in the production of any evidence showing her as being the representative of management with regard to policy making decisions or the implementation of said decisions (Tr. pg. 27). In fact, testimony was presented that Union members, specifically Supervising Biologists, often attended the senior staff meetings (Tr. pg. 20). While Ms. Sparks testified that she relies on the two (2) Deputy Chiefs and Ms. Masson "to discuss, prioritize, look for solutions...and strategize in terms of goals..." (Tr. pg. 50, lines 2 – 6), she also acknowledged that Ms. Masson's role was largely "oversight and the support for staff to develop projects and programs..." (Tr. pg. 50, lines 10 – 12).

Ms. Masson did acknowledge that she exercised some independent judgment and was responsible for ensuring that people in her office were at work and were performing the job they were supposed to perform (Tr. pg. 32). However, it cannot be said, and the Board does not find that these functions are so aligned with management that the Federal Aid Program Coordinator position can be viewed as coming within the definition of a managerial employee. In this context, it is also interesting to note that Ms. Sparks, when questioned by the Department's counsel regarding the substance of Ms. Masson's testimony, admitted that Ms. Masson's testimony describing her work as a Federal Aid Program Coordinator was accurate, though Ms. Sparks thought Ms. Masson was "minimizing" or underplaying her role in the Department (Tr. pg. 55, lines 8 – 12). While Ms. Sparks testified that she relied on Ms. Masson for "some creative insights," and that Ms. Sparks thought Ms. Masson played "a larger role" in the Division than she portrayed in her testimony, Ms. Sparks did not provide in her own testimony any sufficient concrete examples that demonstrated Ms. Masson's role in management or would bring Ms. Masson into the realm of a managerial employee. In short, the testimony provided by the Department was more generic and given to broad statements claiming Ms. Masson exercised a "critical role in formulating and effectuating Division policy as a member of the Division core management team," (Department Memorandum at pg. 15), then actually providing specific, verifiable examples.

Based on all of the above, the Board determines that the Federal Aid Program Coordinator is not a managerial position and, as such, cannot be excluded from the bargaining unit based on this consideration.

#### ***B. The Supervisory Exception***

The Department also asserts that the Federal Aid Program Coordinator "falls squarely within the supervisory exception." (Department Memorandum at pg. 18.) As with the managerial exception, the Union also disputes Ms. Masson's supervisory status asserting, in essence, that though the job specifications state that the Federal Aid Program Coordinator "supervises and reviews the work of the staff" (Joint Exhibit #10) the supervision exercised by the Federal Aid Program Coordinator is clerical in nature and does not satisfy the definition of supervisor contained in the Board's rules or case law (Union Memorandum at pgs. 12 – 13).

While the question of the Federal Aid Program Coordinator's supervisory status is a significantly closer call than was presented with the managerial exception, the Board's review of the evidence supports a determination that the Federal Aid Program Coordinator is not a supervisor and should not be excluded from the bargaining unit on that basis.

As noted above, the Board's regulations and existing case law has set forth a number of functions or factors that, the performance of any one, will generally demonstrate an employee's status as a supervisor (See Board General Rules & Regulations, 1.2A No. 46; *Board of Trustees, Robert H. Champlin Memorial Library*, 694 A.2 at 1189). The testimony from Ms. Masson revealed that her responsibilities included signing time sheets for the employees in the Business Administration section and leave requests for those individuals (Tr. pg. 27). Ms. Masson also stated that she approves vacation requests, is responsible for making sure that people in her office are at work and at their job when they are supposed to be and that they don't leave early or come in late (Tr. pg. 32). She also testified that she takes corrective action if someone comes in late and that she is responsible to intervene if one of the employees in her area was constantly making mistakes (Tr. pgs. 32 – 33).

As pointed out by the Department (Department Memorandum at pg. 19) and as the case law makes clear, the performance of any one of the factors set forth in the definition of a supervisor is sufficient to grant supervisory status provided that the exercise is not of a merely routine or clerical nature but requires the use of independent judgment." (*Board of Trustees, Robert H. Champlin Memorial Library*, 694 A.2 at 1189). Clearly, there is little disagreement between the parties regarding Ms. Masson's exercise of the specific functions identified in her testimony. Similarly, taking the functions at face value, neither party disputes that the exercise of the functions as identified could create supervisory authority for the Federal Aid Program Coordinator position. Where the parties disagree and the challenge that the Board has had to resolve, is whether the exercise of the specific functions identified by Ms. Masson in her testimony, i.e.// signing timesheets, granting leave requests, approving vacation requests, responsibility for making sure people are at work, responsibility for making sure people don't leave early or come in late and responsibility for taking corrective action if someone comes in late or is constantly making mistakes (Tr. pgs. 32 – 33), is accomplished in such a manner that "the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." (See Board General Rules & Regulations, 465-RICR-10-00-1-1.2(A)(46)).

In the instant case, it appears clear from a review of the evidence submitted that Ms. Masson's exercise of these typically supervisory functions is simply of a routine or clerical nature and does not rise to the level that requires her to use independent judgment as mandated by the Board's Rules & Regulations and case law. For example, the testimony was undisputed that while Ms. Masson signs the timesheets and leave requests for those employees in her area, those documents are also counter-signed by the assistant director (Tr. pg. 27). There was no testimony or evidence to suggest that



Ms. Masson could grant leave requests or change or modify a timesheet without receiving the signature/sign off of the assistant director. The same is true for Ms. Masson's authority with regard to vacation requests (Tr. pg. 32). While Ms. Masson acknowledged that the assistant director had never said no to a leave request initially approved by Ms. Masson (Tr. pg. 32), this statement in and of itself does not reflect or confer upon Ms. Masson the authority to act independently with regard to authorizing vacations or leave requests as anticipated by the case law and the Board's Rules and Regulations.

Similarly, Ms. Masson acknowledged that she has responsibility for people in her office, making sure they arrive at work on time, don't leave early, and that if there is a tardiness problem or an issue with someone making mistakes, she is responsible for intervening and taking corrective action (Tr. pgs. 32 – 33). However, the testimony was also undisputed that Ms. Masson has never been involved in disciplining employees who report to her, has never been involved in the disciplinary or grievance process and never received any training regarding discipline (Tr. pg. 25). Further, Ms. Masson testified that she had not participated in any labor relations or employee relations meetings, had never handled a grievance and had never received any training as to how to handle a grievance (Tr. pg. 21). In short, the evidence demonstrates that any exercise by Ms. Masson of "corrective action"<sup>6</sup> is clearly of a ministerial or clerical nature. As such, the Board finds that Ms. Masson exercise of her authority does not require the use of independent judgment with regard to the enunciated supervisory functions as found in the case law and the Board's Rules and Regulations.

### **C. *Demonstrating A Community Of Interest***

Having determined that the Federal Aid Program Coordinator is neither a managerial nor a supervisory employee, the question to be answered next is whether the position shares a community of interest with the other positions in the collective bargaining unit for which the Petition of Accretion applies. In the instant case, it is the Board's view, based on the record evidence, that the Federal Aid Program Coordinator does share a sufficient community of interest with other members of the bargaining unit that the position should be included in said unit within the Department.

Initially, it must be recognized that the Department, as noted in its Memorandum, did not dispute that the majority of the factors contained in the community of interest test were satisfied in comparing the Federal Aid Program Coordinator position with other bargaining unit positions (See Department Memorandum at pg. 23). While the Department would apparently like to have the Board minimize the impact of this sharing of a community of interest through recognition of the State's centralization of "all labor relations functions" (See Department Memorandum at pg. 23) that is not the standard upon which the community of interest factors are to be judged. Thus, it is undeniable that the Federal Aid Program Coordinator does, in fact, satisfy the majority of the community

---

<sup>6</sup> There was no evidence submitted or testimony received that indicated or demonstrated that Ms. Masson had ever exercised or taken any "corrective action" against any of the employees in her unit for either tardiness or constantly making mistakes.

of interest factors identified in the Board's Rules & Regulations (See Board General Rules & Regulations, 465-RICR-10-00-1-1.2(A)(10)) and in the applicable case law (See *Rhode Island Public Telecommunications Authority*). While the Department attempts to emphasize the absence of bargaining history, the agreement to create the position originally as a Non-Union position<sup>7</sup> and the extent of the bargaining unit's reach into the upper levels of the Department's organizational hierarchy (Department Memorandum at pg. 23),<sup>8</sup> these factors, even if viewed in a light most favorable to the Department, cannot overcome the overwhelming community of interest shared between the Federal Aid Program Coordinator and the bargaining unit. Add to this, Ms. Masson's desire to be a member of the bargaining unit and her request that this petition be filed in order to include the Federal Aid Program Coordinator position in the bargaining unit, it appears clear that the Union has successfully demonstrated a community of interest between the Federal Aid Program Coordinator and members of the bargaining unit in question.

Based on the above, it is clear to the Board that the Federal Aid Program Coordinator shares a community of interest with members of the bargaining unit to which the petition applies and can, therefore, be included in the bargaining unit.

#### **FINDINGS OF FACT**

1. The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
2. The Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with Employers and grievances and other mutual aid or protection and as such is a "labor organization" within the meaning of the Rhode Island State Labor Relations Act.
3. On September 6, 2016 the Union filed a Petition for Unit Clarification in this matter.
4. On October 5, 2016 an informal hearing was held in accordance with the Board's Rules & Regulations. Thereafter, an investigative report was completed regarding the Union's request to add the Federal Aid Program Coordinator position to the bargaining unit.
5. On June 27, 2017, a formal hearing was held before the Board where testimonial and documentary evidence was submitted.
6. On October 6, 2017 the matter was brought before the Board for a Decision and Order. The Board's final vote ended in a tie and the matter was dismissed on procedural grounds.
7. On October 9, 2018, more than one (1) year after the dismissal of the Union's original Petition for Unit Clarification, the Union resubmitted its Petition to accrete the Federal Aid

---

<sup>7</sup> It should be noted that Ms. Masson did inquire about the possibility of having her position be put in the Union and she was told that she would have to make the request for that to occur, which she ultimately did (Tr. pg. 31). This expressed desire by Ms. Masson to become a Union member appears, in the Board's view, to offset the lack of collective bargaining history surrounding the Federal Aid Program Coordinator position (See Board Rules and Regulations, 465-RICR-10-00-1-1.2(A)(10)).

<sup>8</sup> As noted by the Union in its memorandum, Local 400 has members with pay grades ranging from a low of 16 to a high of 35 (Union Memorandum at pg. 15; See also Joint Exhibit #8).



Program Coordinator position into the bargaining unit at the Department of Environmental Management, Bureau of Natural Resources, Division of Fish & Wildlife.

8. The parties stipulated that the information previously submitted to the Board was fully accurate and reflected the respective positions of each party and such information was accepted by the Board.

9. The Federal Aid Program Coordinator position does not satisfy the Board's Rules & Regulations that define the term "managerial employee" and, as such, the Federal Aid Program Coordinator position is not a managerial employee and cannot, for those reasons, be excluded from the bargaining unit.

10. The Federal Aid Program Coordinator position does not satisfy the definition of a supervisory employee as that term is applied by the Board's Rules & Regulations and case law and, as such, the Federal Aid Program Coordinator position cannot be excluded from the bargaining unit as a supervisor.

11. The Federal Aid Program Coordinator shares a community of interest with other positions identified in the bargaining unit.

#### **CONCLUSIONS OF LAW**

1. The evidence in the record does not establish that the Federal Aid Program Coordinator is someone who formulates and effectuates management policies by expressing and making operative the decisions of the Department, or that the position exercises discretion within or even independently of established Employer policy.

2. The evidence in the record does not establish that the Federal Aid Program Coordinator has the authority, in the interest of the Employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances, or effectively recommend such action. Further, the evidence in the record does not establish that the Federal Aid Program Coordinator's exercise of the foregoing authority was not of a merely routine or clerical nature nor did it require the use of independent judgment.

3. The Federal Aid Program Coordinator shares a community of interest with other positions in the identified bargaining unit.

4. The Union has proven by a preponderance of the evidence that the Federal Aid Program Coordinator position is appropriate for accretion into the bargaining unit defined by Case No. EE-3704 and therefore, is hereby granted.

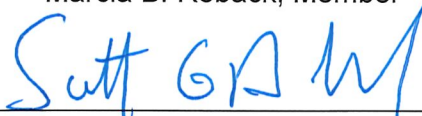
RHODE ISLAND STATE LABOR RELATIONS BOARD



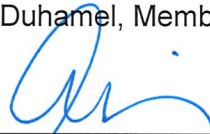
Walter J. Lanni, Chairman



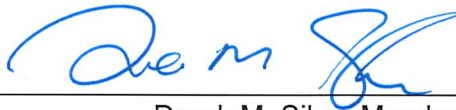
Marcia B. Reback, Member



Scott G. Duhamel, Member



Aronda R. Kirby, Member (Dissent)



Derek M. Silva, Member

**BOARD MEMBER, KENNETH B. CHIAVARINI, ABSTAINED FROM PARTICIPATION IN THIS MATTER.**

**BOARD MEMBER, ALBERTO APONTE CARDONA, WAS ABSENT FROM VOTING IN THIS MATTER. NOTE: ALBERTO APONTE CARDONA VOTED IN THIS MATTER AS A DISSENT)**

Entered as an Order of the  
Rhode Island State Labor Relations Board

Dated: January 9, 2019

By:   
Robyn H. Golden, Administrator



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

---

IN THE MATTER OF :

STATE OF RHODE ISLAND, :  
DEPARTMENT OF ENVIRONMENTAL :  
MANAGEMENT :

-AND- :

LOCAL 400, IFPTE :

---

CASE NO: EE-3704  
UNIT CLARIFICATION:  
Federal Aid Program  
Coordinator (DEM)

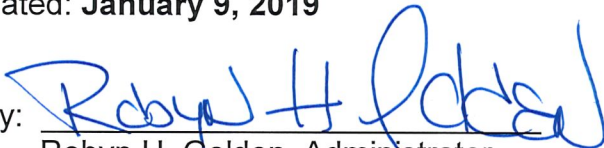
**NOTICE OF RIGHT TO APPEAL AGENCY DECISION  
PURSUANT TO R.I.G.L. 42-35-12**

Please take note that parties aggrieved by the within decision of the RI State Labor Relations Board, in the matter of Case No. EE-3704 dated January 9, 2019 may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **January 9, 2019**.

Reference is hereby made to the appellate procedures set forth in R.I.G.L. 28-7-29.

Dated: **January 9, 2019**

By:



Robyn H. Golden, Administrator