The Board of Selectmen met in Executive Session on July 30, 2013 in the Tisbury Senior Center.

Present: Jeffrey C. Kristal, Chairman; Jonathan V. Snyder; and Tristan R. Israel Clerk; John W. Grande, Town Administrator and Aase M. Jones, Assistant to the Town Administrator.

Also Present: Town Counsel Brian Maser, Lt. Eerik Meisner, Police Chief Daniel Hanavan and MCOP Representative Christopher Kelsey, Jennifer Smith, Esq., and Kelly Kershaw (when indicated in minutes).

Motion: That the Selectmen adjourn to Executive Session in order to discuss strategy with respect to a union grievance at Step 2 of the grievance process, to reconvene in Open Session. Seconded.

Voting on the Motion: Mr. Israel: Yes; Mr. Kristal: Yes; Mr. Snyder: Yes.

Convened in Executive Session: 6:00 p.m. M/s/c.

Also Present: Chief Daniel Hanavan and Lt. Eerik Meisner.

Mr. Grande stated in his introductory remarks that he wanted Brian Maser to have an opportunity to speak directly with Mr. Kelsey of MCOP regarding the settlement offer that the Town made to Kelly Kershaw, and explain to the Selectmen exactly how we got to this point.

Mr. Maser stated that throughout he has had regular discussions with Gareth Notis, counsel from Morrison Mahoney, the insurance company handling the earlier Kelley Kershaw MCAD case (now at the Superior Court level) and how that case relates to the current situation with her recent termination by the Town on June 10th.

Mr. Maser continued by stating that if Ms. Kershaw wants to bring up the issue of retaliation as reason why she was disciplined, Mr. Notis has stated that he would “welcome that” as he feels that this charge will not make Ms. Kershaw look very good in the view of the court. He added that Mr. Notis has indicated that if Ms. Kershaw is interested in resolving this case, the Board of Selectmen is in a position to consider a settlement proposal.

Mr. Maser reported that he sent the draft settlement document to Gareth Notis and Jennifer Smith, the attorney representing MASSCOP and Ms. Kershaw, for review.

Mr. Maser summarized the basic terms of the proposed settlement as follows:
He noted that this would keep her off the active list as a police officer, and if her application for a disability claim is denied by the Retirement Board, she must also resign. Mr. Maser assured the Selectmen that this would be the basic framework for a resolution agreement, adding that he spoke about this with Ms. Kershaw’s attorney Ms. Smith, who seemed to feel that Ms. Kershaw is not willing to fight this and that it would, in a way, wipe the slate clean (for her). He added that the Retirement Board would then determine if Ms. Kershaw is eligible for a disability retirement.

Some discussion followed on how the reinstatement period in FY2013 could be paid for, and it was determined that a Reserve Fund Transfer Request from the Finance & Advisory Committee would be required for the unpaid period following the June 10, 2013 termination. It was further pointed out that if the termination remains in effect, this case could go to arbitration by the union, which Mr. Maser noted will have no guarantee of the outcome.

Mr. Grande noted that the downside to this is what Ms. Kershaw may say publicly after settling and leaving.

Mr. Maser then stated that it is not easy to be able to establish what Ms. Kershaw can say if settling the case.

Mr. Israel commented that the Selectmen are not saying that they did something wrong when voting to terminate Ms. Kershaw on June 10th.

Mr. Israel reiterated that if Ms. Kershaw is denied a disability pension by the Retirement Board, she will be required to resign.

Mr. Kristal described this proposed settlement offer as a “win-win” for the Selectmen and the Town, suggesting that a statement to the press and public should be formulated to explain what the Board is doing and why.

Mr. Grande suggested stating that the Selectmen can state that there is a pending lawsuit and therefore cannot comment.

Mr. Israel commented that he is not sure about this, adding that he does not know that she (Ms. Kershaw) is disabled, and then stated that she has not been an exemplary employee. He stated further that he is not sure if he wants to take this message and “dilute it” by going ahead with a settlement with the terms discussed, and then reiterated that he is having second thoughts about this. He concluded by asking why there cannot be a “gag order” as part of the settlement. Discussion followed.

Mr. Kristal suggested demanding a gag order depending on the outcome of the Kershaw Superior Court case.

Mr. Maser assured the Selectmen that they are still accomplishing what they intended and wanted to do.
Mr. Grande suggested that the Board could say that the parties are agreeable to not discuss the details of the settlement. Mr. Maser stated that he would bring this point up with Ms. Kershaw's attorney, Jennifer Smith. After further discussion,

Motion: That the Board of Selectmen approve the draft settlement proposal as presented by Mr. Maser with the addition of a clause re: confidentiality, as discussed. M/s/c.

Some discussion followed on how to proceed with the scheduled Step 2 Grievance Hearing regarding the termination of Ms. Kershaw. Mr. Maser suggested that the Selectmen state that they are here for the scheduled Step 2 Grievance Hearing, have her attorney present her with the proposed settlement offer and then ask her if she has anything that she wishes to say.

At this point there was a brief recess while Mr. Maser delivered the proposed settlement Agreement to the Union.

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During the recess Lt. Meisner, who was present, brought up a proposal to initiate a tracking dog program in the Tisbury Police Department, reporting that he knows someone who has an available partially trained bloodhound which could be useful to help locate missing elders, children and others. The Selectmen asked him to come back to the Board with more details at a future meeting for its consideration. Mr. Israel commented that this would be what he described as a "good marketing tool" for the Police Department.

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Mr. Maser rejoined the Selectmen and then asked if the Chief and the Board would consider dropping the criminal charges filed by the Town against Ms. Kershaw at the fire site on Lagoon Pond Road on May 9, 2013.

Chief Hanavan responded that he could inform the Assistant District Attorney that the Town does not wish to pursue these charges, but cannot guarantee that the ADA will go along with that.

Mr. Maser suggested that the Town could offer to drop these charges in return for Ms. Kershaw dropping the remaining charges in her Superior Court case. Discussion followed.

Mr. Israel stated that he wants Ms. Kershaw to drop her Superior Court case in return for the Town withdrawing or not pursuing the criminal court case that resulted from Ms. Kershaw's threats and general conduct at the fire scene at her house on Lagoon Pond Road on May 9, 2013.

Mr. Maser cautioned that these two cases do not present "apples to apples" in terms of substance, adding that the Town would be getting rid of a problem employee who will never come back to work for the Town, that could be guaranteed to the DA. Mr. Maser speculated that if the charges were not dropped there probably would be a decision by the Court of "a continuation with a finding of probable cause with probation for 6 months".
Ms. Kershaw’s Application to Restore her “License to Carry”: was discussed next.

It was noted that Chief Hanavan declined to restore her License to Carry and give her a License to Carry (a gun). He stated that Ms./Kershaw may be moving to Florida and under the circumstances he does not want to give her the permit to carry a gun in Tisbury.

Chief Hanavan explained further that he pulled her gun license to carry and that she would have to argue her case in court why she should be allowed to carry a gun, and then reiterated that he does not want to give her a gun permit to carry a gun in Massachusetts.

After some discussion the Selectmen agreed that a confidentiality clause would be added to the draft settlement agreement and presented to the Union/Ms. Kershaw for approval.

6:35 p.m. – The Union group, including Christopher Kelsey and attorney Jennifer Smith, left the meeting to caucus.

7:00 p.m. – Brain Maser returned to the meeting with the Selectmen and informed the Board that Ms. Kershaw wants paid leave until September 30th and wants the Town to contribute to her BC/BS medical plan while on unpaid medical leave.

Mr. Maser then asked the Selectmen if there is any “interest” in extending her paid administrative leave beyond July 31st.

The Selectmen unanimously responded: No.

Discussion followed on why the Town would continue to pay the Town share of BC/BS medical benefits when on unpaid leave of absence, the fact that she failed to apply for COBRA after her termination, and why she could not apply for Mass Health medical benefits on her own.

Mr. Israel suggested that she be offered Town BC/BS medical benefits until 7-31-2013 and that she could then apply for Mass Health medical coverage.

Selectman Snyder stated that he is opposed to extending any BC/BS benefits to Ms. Kershaw. Mr. Maser left the meeting at this point to report the Board of Selectmen’s position to the Union.

7:30 p.m. – The Union group, Christopher Kelsey, Jennifer Smith, Esq. and Ms. Kelly Kershaw, as well as Town Counsel Brian Maser, rejoined the Selectmen at this time.

The parties discussed the terms of settlement agreement that are on the table and to which they can agree, with additional conditions as proposed by the Union and the Town as follows:

- Reinstatement back to June 10, 2013 with the termination coming off her employment record;
- Paid Administrative leave until July 31, 2013;
- Unpaid Administrative leave from August 1, 2013 through September 30, 2013;
- Town BC/BS Medical insurance benefits will be paid through Sept. 30, 2013;
- The Town will ask the DA to drop the charges of assault on a police officer, disorderly conduct, interfering with a
firefighter and threats to commit a crime (criminal charges) against Ms. Kershaw re: her conduct at the fire scene at her home on May 9, 2013;
- By October 1, 2013 Ms. Kershaw will file for disability with the Dukes County Retirement Board;
- If she fails to file for the disability retirement by the specified date, (10-1-2013), she will immediately resign from the Tisbury Police Department;
- Ms. Kershaw will remain on unpaid leave status until the Retirement Board makes a decision on her application for a disability retirement;
- If Ms. Kershaw is denied a disability retirement by the Dukes County Retirement Board, she will resign from the Tisbury Police Department;
- The Town will not oppose her application for a disability retirement; and
- MASSCOP will withdraw the “Unfair Labor Practice” aka known as Prohibited Practice under MGL Chapter 151E filed by the Union against the Town with the Labor Relations Commission.

At this time Mr. Maser marked up the original settlement agreement document adding the new provisions and then presented the revised document to the parties for approval.

Each page in the revised and updated document was initialed by Ms. Kershaw as to approval, Christopher Kelsey, MASSCOP representative, called the MASSCOP main office to seek authorization to sign the document on behalf of the Union and was granted such authority.

The revised document with handwritten additions as discussed and as outlined was then duly signed by Ms. Kershaw, and the union representatives.

Motion: That the Tisbury Board of Selectmen approve and sign the revised Settlement Agreement with Ms. Kershaw and MASSCOP as presented, revised and as discussed. M/s/c.

At this point Ms. Kershaw and the MASSCOP representatives left the meeting and Brian Maser congratulated the Selectmen on reaching an agreement, noting that if asked for comment from the media or anyone else, the comment should be limited to the following: “The matter has been settled to the mutual satisfaction of all parties”.

8:00 p.m. – The Selectmen voted to reconvene in Open Session. M/s/c.

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Open Session Minutes from 8:00 p.m. – 8:45 p.m. are recorded separately.

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Motion: To Reconvene in Executive Session to discuss strategy with respect to contract negotiations and collective bargaining, not to reconvene in Open Session.

Seconded.
Voting on the Motion: Mr. Israel: Yes; Mr. Kristal: Yes; Mr. Snyder: Yes.

Reconvened in Executive Session: 8:45 p.m. M/s/c.

Owen Park Dock Repair Contract – Change Order #2 for $7,000: was discussed next.

Also Present: David Willoughby and Eugene deCosta, representing Cricket and Rainman Builders, Inc., the company that repaired the dock.

It was noted that the bid awarded to Cricket and Rainman Builders, Inc., was in four parts as follows: (#1) 10,368; (#2) $17,630; (#3) 25,252; and (#4) $9,250, for a total contract of $62,500.

It was noted that Change Order #1 for an additional payment of $1,550 was approved by the Board of Selectmen on June 18, 2013.

Mr. Willoughby noted that additional work done on the dock was discussed with DPW Director Fred LaPiana and the contractor, noting that there were some additions and some deductions to the contract as work progressed.

Mr. LaPiana reported that the parties had agreed to settle for an additional amount of $7,000 in Change Order #2, and recommended that the Board approve Change Order #2 in that amount, which would bring the contract for the Owen Park Dock repair to a total of $70,050. Mr. LaPiana added that the Town appreciates the work that was done and completed on time.

At this point Mr. Willoughby expressed his objections to this proposal, noting that the original contract proposal had 4 phases as follows: Phase I: $10,368; Phase II: $17,630; Phase III: 25,252; and Phase IV: $9,250, for a total contract price of $62,500.

He acknowledged payment for Phases I, II, and III, and Change Order #1 for $1,550, noting that Phase IV was not done as agreed upon by the contractor and the Town, adding that he received a total of $53,250.

Mr. Willoughby then presented a bill summarizing the additional work that was done, totaling $15,975, for which he requested payment by the Town as Change order #2. Mr. LaPiana acknowledged that the work performed at the end of the dock constituted a legitimate change order, but continued by explaining that since Phase IV ($9,250) was not completed, that amount would be deducted from the $15,975, and then re-iterated that the parties had agreed to settle Change Order #2 for $7,000, and recommended that the Selectmen approve that amount. He explained further that the issue here is the value of the contract awarded vs. the invoiced amounts plus Change order #1, minus the cost of Phase IV which was not done by the contractor.

Mr. LaPiana summarized by noting that $54,800 has been billed and paid by the Town, including Change order #1, and then recommended that the Board approve the payment of $7,000 for Change Order #2.

Motion: That the Board of Selectmen approve the Owen Park Dock Project Change Order #2 in the amount of $7,000 as discussed and as
agreed upon between the contractor and the Town and recommended by DPW Director Fred LaPiana, who acted as the supervisor of this project for the Selectmen. M/s/c.

Emergency Services Facility Project Close-out Discussion: followed next.

A written proposal received via e-mail dated July 34, 2013 from Ken Dellacroce of Seaver Construction to David Doneski, was discussed and is hereby incorporated by reference. The proposal includes provision to close out the project as follows: (1) Settlement of $100,000 less the $10,00 recently paid to Seaver; (2) Release by Seaver of the Eagan third party claim; (3) Seaver will not serve the Town will Allied Waterproofing and Advantage Glass claims; (4) Seaver will release the Town from DDS third party claim, but the Town must assist Seaver in defense of DDS claim and Town’s potential backcharge; (5) Seaver agrees to withholding $20,000 from the final $90,00 payment (to Seaver) until the HVAC/DDS items are resolved.

Mr. Grande described the proposal as “reasonable”, adding that it would protect the Town from future legal entanglements, with regard to the HVAC system deficiencies, including the fixing of the fan system.

He commented further that the Town would have some funds left to work on problem areas.

A discussion followed on the DCAM evaluation which is also a part of the settlement. Mr. Grande pointed out that David Lager of NETCO as the Town’s Project Operations Manager has to sign off on that, noting that Mr. Lager wants commentary in the evaluation and that he is wary of that. He commented further that the Seaver Corporation needs a passing score on the DCAM evaluation for the project and is interested in getting that kind of evaluation. He suggested that the Town could give Seaver what he referred to as a “brass tacks” DCAM minimum evaluation so that the company will pass, which would be a signal to others and provide some publicity.

Mr. Grande suggested that he would like to complete the form and have David Lager sign it, but noted that he is not sure how this would work out, and added that if Mr. Lager writes the evaluation, he is concerned that it will become a major essay which could cause the Town further problems in the future. He concluded his comments by stating that Mr. Lager has strong feelings about the Seaver performance on this project.

Fire Chief John Schilling commented that he feels that the Town is going backwards with regard to the condensation issues in the building, noting that there is water on the floor, predicting that the lights will be rusting. He stated further that the Town cannot negotiate a settlement without incurring further costs adding that despite efforts to avoid litigation, additional costs will follow, suggested that we must protect our investment in the ESF building and concluded his comments by stating that the Town will have nothing to gain by a protracted dispute with the contractor and recommended the Town cut its ties with the Seaver Corporation.
The Fire Chief stated that he is encouraged by Seaver’s e-mail proposal offer which would release the Town from future responsibility. After a brief discussion,

Motion: That the Board of Selectmen accept the settlement proposal as presented by Seaver in the e-mail dated 7-24-2013, as discussed. M/s/c.

The Fire Chief then stated that he does not want to see any more negotiations with Seaver, adding that this project must be closed out.

Discussion followed on the DCAM evaluation of the contractor and whether Mr. Lager can do the DCAM evaluation with the kind of passing grade that Seaver wants and needs.

Mr. Kristal asked the Fire Chief if he would work with Mr. Lager again if an opportunity arose.

Chief Schilling responded that he is not sure, adding that there was what he described as “a total disconnect” between Mr. Lager and former Town Administrator John Bugbee, explaining that advice that Mr. Lager provided through Mr. Bugbee was often not communicated (by Mr. Bugbee) to the Building Committee and therefore not followed.

Town Administrator Jay Grande suggested that the Chief work with him and David Lager to fill out the DCAM evaluation for Seaver, noting that the Town must be able to document the score that is given, adding that if the score is low, additional information must be provided. Mr. Grande commented further that the resolution to the HVAC system is outside the proposed settlement with $20,000 to be kept to resolve the HVAC outstanding issues.


Mr. Kristal read into the record the key points from the document, items 1-12, and asked for a motion to approve and execute this Memorandum of Understanding.

Motion: That the Board of Selectmen approve and sign the MOU for the Police Union contract settlement for FY2013, 2014, and 2015, items 1-12, as presented and as discussed. M/s/c.

There being no further business in Executive Session,

Motion for Adjournment: 9:25 p.m. M/s/c.

Respectfully submitted,

Jeffrey C. Kristal, Chairman  
Aase M. Jones, Asst. to Town Adm.

Jonathan V. Snyder  
Tristan R. Israel, Clerk

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