

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of * Case No. CAS-12-2115
*
CITY OF GLOUCESTER *
* Date issued: May 30, 2014
and *
*
AFSCME, COUNCIL 93, AFL-CIO *
*

Board Members Participating:

Marjorie F. Wittner, Chair
Harris Freeman, Board Member¹

Appearances:

Naomi R. Stonberg, Esq. - Representing the City of Gloucester
Gregor A. Pagnini, Esq.
Wayne Soini, Esq. - Representing AFSCME, Council 93

DECISION

1 Summary

2 AFSCME Council 93, AFL-CIO (AFSCME or Union) seeks to accrete the title of
3 "Manager of School Transportation Equipment and Emergency Generator Maintenance"
4 (MST)² into its bargaining unit of City of Gloucester (City) Department of Public Works

¹ Board Member Elizabeth Neumeier recused herself from this decision.

² The record reflects a number of different names for the disputed title, including "School Transportation Mechanic" and "Transportation Maintenance Manager." For the sake of consistency, we refer to this title to as the "Manager of School Transportation Equipment and Emergency Generator Maintenance," which is how the title appears in the incumbent's employment contracts with the School Superintendent.

1 (DPW) employees, including custodial, maintenance and rink employees. The Union
2 primarily bases its petition on a promise that the City's personnel director allegedly
3 made to the President of the City DPW unit to include the MST, a School District
4 employee, in the City DPW unit. The City denies that any such representation was
5 made and objects to the petition on a number of grounds, including that the MST is
6 employed by the Gloucester Public Schools, not the City. Based on the following facts
7 and for the reasons set forth below, the Commonwealth Employment Relations Board
8 (Board) concludes that Sections 1 and 3 of M.G.L. c. 150E preclude the Board from
9 accreting the MST, a School District employee, into a bargaining unit of City employees.

10 Statement of the Case

11 The Union filed the petition on July 31, 2012. On October 30, 2012, the DLR
12 held an informal investigative conference with both parties to discuss the issues raised
13 by the petition. The parties submitted supporting documents, including affidavits, before
14 and after the conference. After receiving this information, because it did not appear that
15 there were any material facts in dispute, on January 21, 2014, DLR sent the parties a
16 letter asking them to show cause why it should not resolve the matter based on the
17 information contained in the letter. The show cause letter also requested some
18 additional information, which the City and the Union provided on January 29 and
19 February 3, 2014, respectively. Because their responses did not raise any material
20 disputes of fact, the Board renders its decision on the facts set forth below.

21 Facts

22 The Bus Mechanic/MST Title, Generally

23 The School Committee created the MST title around October 2005. Shortly

1 thereafter, John Wheeler (Wheeler) entered into a contract with the Gloucester School
2 Superintendent to serve in this capacity. Wheeler first began working for the Gloucester
3 School District (School District) as a school bus mechanic in 1995. At that time, in
4 addition to representing a unit of Department of Public Works (DPW) and other
5 maintenance and custodial workers employed by the City (Local 687-A or DPW unit),
6 AFSCME also represented a separate bargaining unit of School District “custodians,
7 maintenance and rink” employees (Local 687).³

8 Wheeler has never been a member of Local 687, Local 687-A or any other City
9 or School District bargaining unit, whether as a bus mechanic or the MST. Instead,
10 from at least 1998 until the present, Wheeler’s terms and conditions of employment
11 have been set forth in a series of one or two-year employment contracts between him,
12 as an individual, and either the School Superintendent or the School District.⁴
13 Wheeler’s contracts provide for his participation in the City’s various group insurance
14 programs and the state retirement system, and state that “nothing in this agreement

³ AFSCME also represents a unit of School District clerical employees. The other bargaining units within Gloucester’s School District are: Teachers (Gloucester Teachers Association); Paraprofessionals (Gloucester Association of Educational Paraprofessionals); School Nurses (Massachusetts Nurses Association); Cafeteria Workers (Teamsters Local 42); Bus Drivers (Teamsters Local 42); Noon Supervisors (Noon Supervisors Association); Assistant Principals (Gloucester Administrators’ Association). and Crossing Guards and Bus Monitors (the record does not reflect the name of this group’s exclusive representative).

On the City-side, in addition to representing the DPW unit, AFSCME represents a unit of clerical and library workers and a unit of non-professional employees employed at the Housing Authority.

⁴ The preamble to Wheeler’s contracts from 1998-2010 listed the Superintendent as the other party. The most recent contract listed the “Gloucester Public School District” as the other party. Like all the other contracts, however, it was signed by the Superintendent.

1 shall prohibit him” from joining the “MTR” (Mass Teachers Retirement) System.⁵ The
2 most recent contract the City provided was effective from July 1, 2010 until June 30,
3 2012. This contract was signed by Wheeler and the Superintendent.

4 The City provided job descriptions for both the Bus Mechanic and MST position.⁶
5 The job descriptions are similar in that both reflect that the MST and the Bus Mechanic
6 report to the School Committee’s “Transportation Director” or “Transportation
7 Manager,”⁷ both describe responsibilities for maintaining and repairing school buses;
8 training bus drivers regarding mechanical aspects of their work; purchasing necessary
9 parts, spares and materials; and assisting the purchasing department with school bus
10 bid specifications. The stated qualifications for both jobs are essentially the same, and
11 include, among other things, a minimum of 8-10 years’ experience working on heavy-
12 duty trucks or buses.

13 The two job descriptions differ insofar as the MST job description includes
14 additional duties, such as repairing and maintaining emergency generators and acting
15 as the liaison to the bus leasing company.⁸ The MST job description also lists as its first

⁵ The City benefits Wheeler receives are available to all School District employees who do not participate in the teachers’ retirement system.

⁶ The Transportation Maintenance Manager job description was created around October 2005.

⁷ The School Committee has two Assistant Superintendents – one for Teaching and Learning and one for Operations and Central Services. Under the terms of Wheeler’s contract as bus mechanic, he reported to the Assistant Superintendent. Under the terms of his contracts as MST, Wheeler reported to and was evaluated by the Assistant Superintendent (Operations and Central Services) and the Transportation Manager, a title that also oversees the bus drivers.

⁸ Wheeler’s 2003 employment contract indicates that he performed emergency generator maintenance duties even before his title changed.

1 "Principle Responsibility" the "implementation of the policies of the school committee."
2 Notwithstanding these differences, the approximately \$2,000 salary increase that
3 Wheeler received after assuming the MST position appears roughly commensurate with
4 the \$1,000 - \$2,000 increases he received while a Bus Mechanic each time that
5 contract was renewed.⁹

6 The Gloucester School District is responsible for leasing, maintaining and
7 servicing all school vehicles, including school buses. School buses are not City
8 property and the City bears no responsibility for maintaining school buses or any other
9 school vehicles. Since 1998, all regular full-time and regular part-time school bus
10 drivers employed by the School Committee have been represented by Teamsters, Local
11 42.¹⁰ The bus drivers report to the School District's Transportation Manager, who
12 reports to the Assistant Superintendent for Operations and Central Services.

13 Transfer Agreement

14 In 2010, the School Committee and the City entered into an agreement (Transfer
15 Agreement) that transferred responsibility for the cleaning, maintenance and repair of
16 school buildings and grounds from the School District to a centralized Facilities and
17 Maintenance department under the City's jurisdiction. The Transfer Agreement's
18 preamble states in pertinent part:

19 THIS AGREEMENT is for the transfer of responsibility for maintaining and
20 repairing the City of Gloucester school buildings and grounds. This
21 agreement shall constitute the understanding between the Director of the

⁹ The one exception is the 12-month contract Wheeler entered into in 2003-2004, which froze his salary at the 2002-2003 level of \$47,946.52.

¹⁰ The Board takes administrative notice of the certification issued by the former Labor Relations Commission in Case No. MCR-4657.

1 Department of Public Works (DPW Director), with the approval of the
2 Mayor, and the Superintendent of Schools (Superintendent), with the
3 approval of the School Committee, in accordance with G.L. c. 71, §37M,
4 relative to the maintenance of all buildings, grounds, on-site pavement
5 management and snow removal under the care, custody and control of the
6 School Committee.
7

8 WHEREAS, the parties desire to institute a centralized facilities
9 maintenance department which shall be under the jurisdiction of the
10 Department of Public Works to manage all of the buildings and grounds
11 owned by the City of Gloucester in a uniform and high quality manner.

12 The Transfer Agreement contains several paragraphs regarding the specific School
13 property covered by the agreement and who retains control over the property.

14 Paragraph 4 (e) (Consolidation) states:

15 All school buildings and building systems, including but not limited to the
16 electrical, mechanical, plumbing, public address system, clocks and
17 security alarm systems shall be maintained and repaired under the DPW
18 Director. All educational and office equipment and telephone and IT
19 systems within the buildings shall remain the responsibility of the School
20 Committee.
21

22 Paragraph 8, "Vehicles," states:

23 All motor vehicles and mechanical equipment related to the maintenance
24 of facilities not attached to or part of a school building will be purchased by
25 the City and maintained and repaired by the Department of Public Works.
26

27 Paragraph 11, "Control over Property," states:

28 The DPW Director and Superintendent recognize that the School
29 Committee is and shall remain the policy making body for the school
30 system. The School Committee, consistent with these provisions, and
31 with M.G.L. c. 71, shall retain full jurisdiction and control over the use and
32 rental of school buildings, facilities and grounds.

33 The Transfer Agreement also contains several paragraphs regarding personnel
34 matters. Paragraph 4(a) states that effective July 1, 2010, the School Committee and
35 the City agreed that "a Director of Facilities, who reported to the DPW director, would
36 direct the "facilities staff, 'trades' employees and all custodial staff." Paragraph 4(c)

1 states that “the negotiating team representing the City for the purposes of the collective
2 bargaining agreement shall include the Chair of the Personnel Subcommittee.”¹¹

3 The Transfer Agreement contains no references to school buses, bus drivers or
4 the MST. The parties do not dispute that, around March 2012, AFSCME’s DPW unit
5 included all of the titles that had been included in AFSCME’s school custodians,
6 maintenance and rink employees’ bargaining unit. At that point, the transferred
7 employees were City employees who reported to the City’s DPW director. The parties
8 also do not dispute that the MST was not one of the School District titles transferred
9 pursuant to the Transfer Agreement.

10 Local 687-A 2011-2013 CBA and Recognition Clause

11 At some point after the School Committee and the City entered into the Transfer
12 Agreement, the City and AFSCME began negotiations for a new DPW contract.
13 Although the record does not reflect when negotiations began, David Bain (Bain), the
14 City’s personnel director, and Teixeira attended bargaining sessions on January 26,
15 February 23, and March 12, 2012.

16 On March 26, 2012, the parties executed a successor agreement, effective from
17 July 1, 2011 to June 30, 2013 (CBA).¹² The CBA’s recognition clause states:

18 The employer recognizes the Union as the sole and exclusive bargaining
19 agent. . . for all municipal employees represented by said Union as more
20 specifically set forth in Case No. MCR-31 decided by the Commonwealth
21 of Massachusetts State Labor Relations Commission on January 20,

¹¹ As described below, consistent with this provision, Melissa Teixeira (Teixeira), Chairperson of the Personnel Subcommittee of the Gloucester Public Schools, attended a number of Local 687-A successor bargaining sessions.

¹² At the informal conference, the City agreed to waive any objections it had to the petition under the contract bar rule, 456 CMR 14.06 (1)(b).

1 1971. Inclusions are attached.

2 All other positions are excluded. When a new position is created, the
3 parties agree to meet to determine whether it shall be included or not.

4 The parties do not dispute that the MST position was not included in the attachment or
5 mentioned anywhere else in the CBA. The CBA does however list two motor
6 equipment/vehicle maintenance and repair titles, the "Motor Equipment Maintenance
7 Man" and the "Lead Foreman Motor Vehicle Repairman." The City also provided a job
8 description for the "Master Fleet Mechanic," who supervises the motor vehicle
9 repairman and motor equipment maintenance man.

10 The CBA does not expressly reference the Transfer Agreement. It does,
11 however, reflect the inclusion of the former members of Local 687-A in two places – in
12 the list of included employees, which lists "rink maintenance employees," and under
13 Article 6, "Work Hours," which lists all custodians' work hours by location, including "City
14 Hall Custodian," "Custodians at all Elementary Schools," and "Custodians at Gloucester
15 High School."¹³

16 MST Unit Status and Successor Negotiations

17 Before 2012, the Union did not seek to include Wheeler, in his capacity as the
18 school bus mechanic or the MST, in any of its City or School bargaining units. The
19 Union believed that Wheeler was an independent contractor and was unaware that he
20 received City benefits. It was not until after June 30, 2011, when the parties were
21 negotiating the transferred School District employees' terms and conditions of

¹³ The list of included employees does not otherwise differentiate custodians or maintenance personnel that work in the schools from their counterparts who work in City buildings. Instead, it lists generic titles like "Maintenance Man" "Facilities Maintenance," and "Building Custodian."

1 employment, that Bain confirmed to Joe Biondo (Biondo), then President of Local 687-
2 A,¹⁴ that Wheeler was not an independent contractor, but an employee who received
3 City benefits.

4 At the informal conference, Biondo claimed that Bain told the Union, "If you want
5 him [Wheeler], he is yours." At the time Bain allegedly made this statement, Biondo
6 understood that Wheeler had not been transferred over to the City's centralized facilities
7 maintenance department as part of the implementation of the Transfer Agreement and
8 that Wheeler still reported to School personnel.

9 Conversely, Teixeira stated that she never heard Bain tell the Union that the MST
10 was going to be placed in the City's bargaining unit and that her notes do not reflect that
11 Bain ever made this statement. Teixeira asserts that if she had heard Bain say this, she
12 would have objected based on her position that the School District has and continues to
13 have supervisory responsibility over the MST."¹⁵

14 On March 12, 2012, School Superintendent Richard Safier sent the following
15 letter:

16 To Whom It May Concern:

17 In response to inquiries about Mr. John Wheeler's position relative to
18 AFSCME, the school district wishes to point out that Mr. Wheeler is
19 employed by and under contract with the school department and not the
20 City. His position was not transferred over to the City through the
21 Memorandum of Understanding between the City and the Gloucester
22 Public Schools. Further, Mr. Wheeler does not share a community of
23 interest with the members of AFSCME. He is the Manager of School
24 Transportation Equipment for the Gloucester Public Schools.

¹⁴ Biondo served as Vice President/Steward of Local 687-A at the time of the informal conference.

¹⁵ This information is based on two affidavits from Teixeira, which were included in the City's submissions.

1
2 Therefore, your request to accrete this position to the bargaining unit is
3 denied.¹⁶

4 On March 26, 2012, Biondo signed the new CBA.

5 Opinion¹⁷

6 The issue before us is whether to accrete the MST, a School District employee
7 into Local 687-A, a unit comprised of DPW, maintenance and custodial employees
8 employed by the City. As a general rule, a unit clarification petition is the appropriate
9 procedural vehicle to determine whether newly-created positions should be included or
10 excluded from a bargaining unit or to determine whether substantial changes in the job
11 duties of existing positions warrant either their inclusion or exclusion from a bargaining
12 unit. City of Malden, 32 MLC 97, 99, CAS-04-3599 (November 2, 2005) (citing Sheriff of
13 Worcester County, 30 MLC 132, 136, CAS-03-3543 (2004); North Andover School
14 Committee, 10 MLC 1226, 1230, CAS-2525 (September 27, 1983). Further, a unit
15 clarification petition is appropriate if the outcome sought by the petition is “[c]learly
16 supported by an apparent deficiency in the scope of the existing unit and must be, at
17 least arguably, within the realm of what the parties intended when the unit was first
18 formulated.” City of Malden, 32 MLC at 99.

19 What makes this case unusual is that the MST is not employed by the City since
20 his title was not transferred over to the City under the terms of the Transfer Agreement.
21 Rather, the MST has, at all times material to this case, been employed by the School

¹⁶ The Union provided a copy of this letter in response to the Show Cause notice, as evidence that, “notwithstanding Bain’s assertion that the Union could have the position, in March, 2012 the MST position was nonetheless not included in the listed bargaining unit positions.”

¹⁷ The Board’s jurisdiction is not contested.

1 District under the terms of an employment contract that he and the Superintendent of
2 Schools signed. There is no evidence that the School Committee subsequently decided
3 to transfer the MST or school vehicle maintenance/repair functions over to the City. Nor
4 is there evidence that Bain was the School Committee's agent or that the School
5 Committee otherwise delegated authority to Bain to make unit placement or transfer
6 decisions about non-professional school employees who were not transferred pursuant
7 to the Transfer Agreement. Finally, both the School Superintendent and the School
8 Committee's representative on the City's bargaining team have objected to accreting
9 the MST into Local 687-A.

10 Notwithstanding these facts, the Union argues that accretion is appropriate
11 because the City's personnel director promised Local 687-A's president that the MST
12 could be part of its bargaining unit. The Union therefore claims that because the MST
13 otherwise shares a community of interest with the other titles in Local 637-A, the Board
14 should give effect to that promise and accrete the MST into the City's unit. Under the
15 Board's three-part accretion analysis, we would ordinarily give effect to the parties'
16 agreement regarding the scope of their unit and accrete a newly-created title into a
17 bargaining unit with which it shares a community of interest. See generally Boston
18 Public Health Commission, 39 MLC 218, 229-230, CAS-11-1091, CAS-11-1092
19 (February 28, 2013) (setting forth three-prong accretion analysis). Even assuming
20 without deciding, however, that the City's personnel director made this promise and that
21 the MST shares a community of interest with the DPW unit, we decline to do so based
22 on the language and policies underlying Chapter 150E, Sections 1 and 3.

1 Section 1 of the Law defines “employer” as: any “city... acting through its chief
2 executive officer . . . In the case of school employees, the municipal employer shall be
3 represented by the school committee or its designated representative or
4 representatives.” Thus, in this case, because there is no evidence before us
5 demonstrating that Bain was acting as the School Committee’s agent or, indeed,
6 demonstrating the School Committee’s involvement at any level in Bain’s alleged
7 agreement to place the disputed position in the Union’s unit, Bain’s alleged promise to
8 place a school employee in a municipal bargaining unit is unenforceable.

9 Equally important is the fact that Section 3 of the Law requires that the Board’s
10 determination of appropriate bargaining units “be consistent with the purposes of
11 providing for stable and continuing labor relations. . .” In this regard, we recognize that
12 municipal employers and school committees traditionally maintain separate bargaining
13 units for municipal and school employees. We are unaware of any authority that gives a
14 municipal employer the right to unilaterally designate a school employee a municipal
15 employee without the school committee’s assent or vice versa. To give effect to Bain’s
16 promise here would not only disregard the Section 1 statutory scheme for municipal and
17 school employers, but also create instability between the two workplaces in
18 contravention of the Board’s standards for making unit determinations under Section 3
19 of the Law.

For all of these reasons, the Board declines to accrete Wheeler into Local 637-A

and this matter is dismissed.¹⁸

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



HARRIS FREEMAN, BOARD MEMBER

¹⁸ The Union argues that dismissal of this petition would leave Wheeler without union representation. We note that even though AFSCME no longer represent a separate unit of school custodians and maintenance employees, there are other non-professional bargaining units within the Gloucester public schools into which the MST could potentially be accreted.