

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

In the Matter of

CITY OF NEWBURYPORT

and

AFSCME, COUNCIL 93, AFL-CIO

*
*
*
*
*
*
*
*

Case No. CAS-13-3101

Date Issued:
September 12, 2014

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Appearances:

Erin L.DeRenzis, Esq. - Representing AFSCME, Council 93, AFL-CIO

Darren R. Klein, Esq. - Representing the City of Newburyport

DECISION

Summary

1 The issue presented in this case is whether the Executive Assistant to the Fire
2 Chief is a confidential employee within the meaning of Section 1 of M.G.L. c.150E (the
3 Law) who should be excluded from the bargaining unit that AFSCME, Council 93, AFL-
4 CIO (Union or AFSCME) represents in the City of Newburyport (City). We conclude that
5 the disputed title is a confidential employee within the meaning of the Law, and,
6 consequently, we dismiss the Union's petition.

Statement of the Case

1 On September 6, 2013, the Union filed a unit clarification petition with the
2 Department of Labor Relations (DLR) seeking to accrete the newly-created position of
3 Executive Assistant to the Fire Chief into AFSCME's existing bargaining unit. The City
4 and AFSCME subsequently participated in an informal conference at the DLR's office
5 on November 19, 2013. The parties submitted information, affidavits and position
6 statements before and after the conference.

7 By letter dated August 5, 2014, the Commonwealth Employment Relations Board
8 (Board) directed the parties to show cause why it should not resolve the unit clarification
9 petition based upon the information provided at the informal conference and
10 summarized in the August 5 letter. Neither party filed a response. Because all material
11 facts necessary to the Board's decision in this case are not in dispute, it is appropriate
12 to decide the case based on the information that is set forth below. Based on these
13 facts, we conclude that the Executive Assistant to the Fire Chief is a confidential
14 employee within the meaning of Section 1 of the Law, and we dismiss the Union's
15 accretion petition.

Statement of Facts

17 **AFSCME's Bargaining Unit**¹

18 The City and AFSCME are parties to a collective bargaining agreement covering
19 the period of July 1, 2012 – June 30, 2015 (CBA).² The recognition clause of the CBA
20 states that the City recognizes AFSCME as the exclusive collective bargaining

¹ The DLR has no records regarding certification for AFSCME's bargaining unit.

² The Union ratified the CBA in November of 2012, and the City ratified it in March of 2013.

1 representative for all employees of the City of Newburyport excluding all Department
2 Heads, Administrative Assistant to the Assessor; Assistant Assessor; Assistant
3 Treasurer; Administrative Assistant to the Auditor; all employees of the Clerk's Office
4 (Admin. Secretary; Parking Clerk and Assistant Clerk), Appointed Officials, [and the]
5 Executive Secretary to the Mayor. AFSCME's bargaining unit contains approximately
6 135 employees in a wide variety of positions, including the titles Administrative
7 Secretary and Administrative Assistant. AFSCME's bargaining unit includes the
8 Administrative Assistant to the Police Chief.³

9 **The Fire Department**

10 The Fire Department employs one Chief, one deputy chief, four lieutenants,
11 twenty-eight full-time firefighters, four full-time dispatchers, and three call firefighters.
12 All of the full-time employees other than the Chief are included in bargaining units. The
13 firefighters are represented by Local 827, I.A.F.F., AFL-CIO, and AFSCME represents
14 the dispatchers.

15 The Executive Assistant position is a newly-created position. Previously, the City
16 did not have an administrative position in the Fire Department, and former Fire Chief
17 Stephen Cutter (Cutter) performed all of the administrative duties himself.

18 The Fire Chief is a managerial employee and a member of the City's negotiating
19 team. He attends collective bargaining sessions, participates in determining the City's
20 bargaining strategy, and potentially drafts bargaining proposals and counterproposals.

³ The Police Chief is known as the City Marshal. In addition to the Chief, the Police Department employs patrol officers, sergeants, lieutenants, and two clerical employees. The uniformed officers are represented by different unions in two separate bargaining units, one for patrol officers and the other for superior officers. The lieutenants perform administrative duties as part of their duties.

1 He also takes personal notes at bargaining sessions. The Fire Chief is responsible for
2 submitting a draft budget recommendation annually, and requesting funding for the Fire
3 Department for the following fiscal year. This process may include making wage and
4 benefit projections. The Fire Chief, as the "Department Head," is also the first step in
5 the contractual grievance procedure.

6 **The Hiring Process for the Executive Assistant**

7 In February of 2013, former Fire Chief Cutter retired and the City convened a Fire
8 Chief Screening Committee to search for a new chief. In the process of drafting the Fire
9 Chief's job description and reviewing applications, the Screening Committee determined
10 that the new chief would need administrative support to accomplish the City's goals for
11 the Fire Department, and to enable the new chief to focus attention on Fire Department
12 management. On April 18, 2013, the City hired Christopher LeClaire (Chief LeClaire) as
13 the Fire Chief. It then sought to fill the Executive Assistant position as soon as possible
14 since Chief LeClaire was scheduled to begin work on June 1, 2013.

15 City Human Resources Director Jennifer Lamarre (Lamarre) discussed the
16 Executive Assistant position with AFSCME president Jerry Cronin (Cronin), noting that
17 the City would use the job description for the Administrative Assistant in the Police
18 Department for reference in creating the Fire Department Executive Assistant job
19 description. The City quickly drafted a job description (initial job description) for the
20 Executive Assistant position and attached it to a job posting. On May 28, 2013, the City
21 posted the position, forwarded the posting, and attached job description to City
22 department heads and to AFSCME Representative James Breslin (Breslin). The

1 posting indicated that the position would be a 35 hour per week position⁴ at AFSCME
2 Grade 24 and provided in pertinent part as follows:

3 AFSCME POSITION OPENING*... **This new position is subject to*
4 *appropriation in the FY14 Budget and may be included as a member of*
5 *the AFSCME collective bargaining unit.” (emphasis in original.)*
6

7 The initial job description stated that the purpose of the position was to provide highly
8 reliable administrative services to the Fire Chief, including processing and maintaining
9 departmental accounts payable, accounts receivables, and payroll; maintain department
10 personnel records; receive phone calls and visitors; develop and implement office
11 procedures; maintain filing system; prepare reports and correspondence; and schedule
12 meetings and appointments. It also stated that: “[t]he Executive Assistant has access to
13 departmental personnel records, legal proceedings, collective bargaining information,
14 and criminal investigations and records.” The initial job description listed the following
15 as essential job functions:

- 16 • Provides executive and administrative support to the Fire Chief to ensure the
17 efficient and smooth operation of the Chief’s Office and schedule.
18
- 19 • Performs a variety of customer service functions as primary contact for the
20 Chief’s Office, screens calls and greets visitors, takes messages, schedules
21 appointments, manages appointment calendars, answers or directs inquiries and
22 complaints as appropriate.
23
- 24 • Assists the Fire Chief in formulation, implementation, and financial reporting of
25 the departmental budget, monitors and tracks all expenditures related to the
26 budget, including various grants, and projects, and provides regular financial
27 reports to the Chief.
28
- 29 • Processes departmental payroll, preparing and inputting payroll data, including
30 the review of payroll data, monitoring hours worked to ensure compliance with
31 collective bargaining agreements, and recording, tracking and maintaining all
32 department employee attendance and leave accounts, resolving discrepancies

⁴ The Executive Assistant’s hours subsequently increased to 40 hours per week.

1 with the City's Human Resources Department. This includes payroll and related
2 OT assignments and special payments for all personnel in the Fire Department.
3

- 4 • Processes departmental accounts payable, ensuring timely processing of all
5 invoices to include the verification of authenticity of the payable(s), identifying the
6 account(s) to be charge[d], and inputting the data into the City's accounting
7 system; interacts with vendors and other City Departments in resolving accounts
8 payable discrepancies.
9
- 10 • Processes departmental accounts receivable and cash receipts, preparing and
11 processing all billing for the department which may include Fire Alarm,
12 Overtime/Detail Billing, etc...
13
- 14 • Processes and posts all department cash receipts and reconciles with City's
15 Finance Department weekly/monthly; and interacts with vendors to collect debt or
16 resolve discrepancies within accounts.
17
- 18 • Maintains and updates various departmental databases and fee schedules.
19
- 20 • Processes grant application filings, requests for reimbursements, and completion
21 of reports, following Federal and State Laws, grant guidelines and timelines.
22
- 23 • Sets up for meetings and functions, determining, creating, and producing the
24 necessary items that are needed (agenda, reports, statistical data, office
25 equipment, refreshments/food items, and other duties as required) and following
26 through so the meeting/function runs smoothly.
27
- 28 • May be asked to provide secretarial assistance to other boards and/or
29 committees that the Fire Chief is a member of.
30
- 31 • May be required to represent the Fire Chief at meetings and be asked to work
32 outside normal business hours.
33
- 34 • Performs other duties as assigned by the Fire Chief.
35

36 After Chief LeClaire began his employment, he concluded that the Fire
37 Department's personnel, medical, and collective bargaining agreement files were in
38 "chaos" as they were unsecured and poorly kept. He determined that it would be a
39 significant responsibility of the new Executive Assistant to properly organize, maintain,
40 and access the Department's personnel, medical, collective bargaining, and other
41 confidential files in a secure manner, and that the Executive Assistant would need keys

1 to all of the Fire Department's confidential files. Chief LeClaire believed that he would
2 need a non-unit confidant since he was the only non-unit employee in the Fire
3 Department.

4 On or about June 18, 2013, Chief LeClaire and Lamarre interviewed applicants
5 for the Executive Assistant position. They asked the applicants some questions
6 pertaining to confidential duties that the Executive Assistant would perform, i.e., "[h]ave
7 you ever worked in a position where you had to keep many things confidential? How
8 did you handle that?" However, the majority of the interview questions pertained to the
9 applicants' experience, goals, skills and qualifications, e.g., "[t]ell us about your specific
10 accounts receivable experience. What exactly did you do and how often did you do it?"

11 On or around July 24, 2013, the City selected Janice Richard (Richard) to fill the
12 Executive Assistant position, and she began her employment on August 5, 2013. In the
13 process of making the appointment, and after further considering the type and nature of
14 the work that the Executive Assistant would be performing, the City amended the prior
15 job description (amended job description) to describe the position's confidential duties
16 more specifically. The amended job description differed in part from the initial job
17 description by expanding the description of the job's purpose to include: updating
18 personnel records and assisting in the review and preparation of confidential
19 documents, including responses to grievances and bargaining proposals. The
20 amended job description noted that the Executive Assistant would have access to
21 litigation materials and correspondence, collective bargaining strategy memoranda, and
22 records pertaining to internal discipline. It also added the following as an essential duty:
23 "Assists the Fire Chief in review and preparation of responses to union grievances;

1 maintains grievance files; [and] assists in preparation of proposals for collective
2 bargaining sessions with [the] union.”

3 By letter dated August 16, 2013, Breslin asked City Director of Policy &
4 Administration Peter Lombardi (Lombardi) whether or not the City would voluntarily
5 recognize AFSCME’s bargaining unit as an appropriate bargaining unit for the Executive
6 Assistant position, and if not, the specific reasons for denying recognition. Lombardi
7 replied by letter dated August 23, 2013, declining to recognize AFSCME and explaining
8 the City’s position as follows:

9 The employee in this position will have a substantial relationship with the
10 Fire Chief. This relationship requires a legitimate expectation of
11 confidentiality in their day-to-day dealings. In this capacity, the individual
12 will have access to confidential information about the City’s collective
13 bargaining strategy and prior notice of what management proposals will be
14 offered at the bargaining table. Moreover, the employee in this position
15 will have access and regular exposure to management’s position on
16 personnel matters, such as discipline and responses to union grievances.
17

18 **The Executive Assistant’s Working Conditions and Duties**

19 Except for working forty hours a week instead of thirty-five, the Executive
20 Assistant has the same hourly rate and benefit package as positions in AFSCME’s unit.
21 Her hours, 7:30 a.m. to 4:00 p.m., are the same as the Fire Chief’s official hours. Her
22 office is connected to the Fire Chief’s office, and people must walk through her office to
23 enter the Fire Chief’s office. There are no additional offices on the floor where the Fire
24 Chief and Executive Assistant work, other than the dispatch center.

25 The Executive Assistant often opens the Fire Chief’s mail, including
26 correspondence regarding financial and personnel matters, retrieves most
27 correspondence forwarded to the Chief’s office by facsimile transmission, which can
28 include confidential material regarding labor and personnel disputes, and has access to

1 the Chief's email and voicemail. When the Fire Chief is not in the office, she is
2 responsible for checking his communications, including his mail, email and answering
3 his telephone. The Executive Assistant has a key to the locked confidential files that the
4 Chief keeps in the Fire Department, and she maintains files containing personal notes
5 that the Chief takes at bargaining sessions.

6 During the budget process for FY2015, the Executive Assistant was involved in
7 making salary and budget projections, analyzing the impact of those projections on the
8 overall Department budget, and calculating potential wage scales. During negotiations,
9 she does not attend bargaining sessions, but she creates and updates a WORD
10 document from the notes and comments she receives regarding the negotiations from
11 the City's negotiators. This document is like a journal of the progress of the
12 negotiations from the City's vantage point. The Executive Assistant circulates it to
13 various City representatives and then files it with the City's collective bargaining files.

14 Opinion⁵

15 Section 1 of the Law defines the "confidential" exclusion as follows:

16 Employees shall be designated as confidential employees only if they
17 directly assist and act in a confidential capacity to a person or persons
18 otherwise excluded from coverage under this chapter.

19
20 The Board has construed this statutory language to exclude those individuals who have
21 a direct and substantial relationship with a managerial employee, so there is a legitimate
22 expectation of confidentiality in their routine and recurrent dealings. Town of Medway,
23 22 MLC 1261, 1269, MCR-4350 and 4352 (October 23, 1995). Regular exposure to
24 confidential material directly related to labor relations policy or equally sensitive policy

⁵ The Board's jurisdiction is not contested.

1 information while directly assisting an excluded employee is grounds for finding an
2 employee confidential. North Attleborough Electric Department, 32 MLC 66, MCR-04-
3 5091 (June 29, 2005). This exclusion has been narrowly interpreted to exclude as few
4 employees as possible, while not unduly hindering the employer's operations. Silver
5 Lake Regional School Committee, 1 MLC 1240, 1243, CAS-163 (January 13, 1975).

6 The City contends that the Executive Assistant is a confidential position because
7 she regularly and routinely performs functions of a confidential nature for the Fire Chief,
8 an excluded employee,⁶ and the only non-unit employee in the Fire Department. It
9 stresses her significant access to confidential information, including personnel, medical,
10 collective bargaining and grievance files, and the City's responses to grievances and
11 internal disciplinary issues. The City notes that the Executive Assistant handles the
12 majority of the Chief's regular mail and retrieves facsimile transmissions, both of which
13 can include correspondence regarding labor and personnel matters, and has access to
14 his email and voicemail. It highlights her responsibility for filing and maintaining the
15 personal notes that the Chief takes at bargaining sessions, and her role in making
16 salary and budget projections for the upcoming fiscal year by analyzing the impact of
17 those projections on the Fire Department budget and calculating potential wage scales.

18 Although the Union challenges the City's general assertion that the position
19 performs work of a confidential nature that would require exclusion from the bargaining
20 unit, it did not dispute any of the facts set forth in the Board's August 5, 2014 show
21 cause notice. Rather, the Union argues that the interviews conducted for the Executive
22 Assistant position did not focus on the alleged confidential nature of the position, and

⁶ The parties do not dispute that the Fire Chief is a managerial employee and thus excluded from coverage under the Law.

1 the position receives Union contractual benefits, “borrows heavily” from existing Union
2 job descriptions, and shares a community of interest with other members of the Union’s
3 bargaining unit. We are not persuaded by the Union’s arguments.

4 There is no dispute that the Executive Assistant performs a variety of non-
5 confidential duties, and the fact that the City questioned applicants primarily on their
6 skills in those areas is inconsequential as is the fact that the City changed the job
7 description during the hiring process. We note AFSCME’s concern for employees who
8 made application decisions in reliance on the initial job description, but in this situation,
9 the City was not precluded from revising the Executive Assistant’s job duties to more
10 closely match the needs of the Fire Department and the interests of the new Chief.
11 Further, the fact that the Executive Assistant’s job description purposely resembles
12 other bargaining unit job descriptions, and that the position may share a community of
13 interest with other AFSCME bargaining unit members compels no contrary conclusion.
14 A position that performs confidential duties is statutorily excluded from bargaining
15 notwithstanding any interests it otherwise shares with bargaining unit employees. The
16 confidential exclusion protects the relationship between the confidential employee and
17 the excluded manager, and once is it shown that an employee is performing confidential
18 duties for a manager, the employee is excluded from coverage under the Law. See
19 Fitchburg School Committee, 32 MLC 177, 180, CAS-05-3614 (June 2, 2006).

20 The record before us demonstrates that the Executive Assistant has a direct and
21 substantial relationship with the Chief, a managerial employee, so there is a legitimate
22 expectation of confidentiality in their routine and recurrent dealings. Town of Medway,
23 22 MLC at 1269. After finding the Fire Department’s files in a state of chaos, the newly-

1 hired Chief LeClaire structured the Executive Assistant's responsibilities to include
2 organizing, maintaining, and accessing the Department's personnel, medical, collective
3 bargaining, and other confidential files in a secure and orderly manner. The new Chief
4 specifically sought a non-unit confidant since he was the only non-unit employee in the
5 Fire Department. In the process of appointing Ms. Richard to the position, the City
6 revised the Executive Assistant's job description to add confidential responsibilities,
7 including: updating personnel records and assisting in the review and preparation of
8 confidential documents, i.e. responses to grievances and bargaining proposals. The
9 amended job description noted that the Executive Assistant would have access to
10 litigation materials and correspondence, collective bargaining strategy memoranda, and
11 records pertaining to internal discipline, and that she would assist the Fire Chief in
12 review and preparation of responses to union grievances, maintains grievance files, and
13 assist in the preparation of proposals for collective bargaining sessions.

14 We further find that the Executive Assistant regularly performs the types of duties
15 that the Board has previously deemed to be confidential. She has significant access
16 and regular exposure to confidential information concerning labor relations issues and
17 management's position on personnel matters by virtue of her responsibility to open the
18 Fire Chief's mail and retrieve faxed correspondence. See Pittsfield School Committee,
19 17 MLC 1369, 1372, CAS-2802 (December 11, 1990) (secretary to the Assistant
20 Superintendent of Operations deemed confidential where she processed and had
21 regular access to mail concerning labor relations matters); Board of Higher Education,
22 33 MLC 12, 14, CAS-05-3613 (June 23, 2006)(excluding president's administrative
23 assistant as confidential because, in addition to opening letters from the vice president

1 of administration and finance regarding financial matters, she received faxes regarding
2 proposed settlement agreements with bargaining units and from the vice president of
3 academic affairs regarding personnel matters). She has a key to the locked confidential
4 files that the Chief keeps in the Fire Department, where she maintains, among other
5 things, files containing personal notes that the Chief takes at bargaining sessions.
6 Although the Executive Assistant does not attend bargaining sessions, she maintains a
7 journal-like electronic document covering the progress of the negotiations from the
8 notes and comments that she receives from the City's negotiators. This document
9 makes her privy to the City negotiators' on-going perspectives and sentiments regarding
10 the progress of the negotiations. The Executive Assistant's exposure to the City
11 negotiators' thoughts and comments regarding the negotiations gives her the same
12 confidential information that she would acquire if she attended a meeting with the City
13 negotiators to discuss the progress of the negotiations. See [Pittsfield School](#)
14 [Committee](#), 17 MLC at 1372 (access to confidential labor relations materials, including
15 materials distributed by Budget Officer and Assistant School Superintendent of
16 Personnel and Negotiations to School Committee's negotiations subcommittee
17 rendered employee confidential).

18

1 Conclusion

2 For the foregoing reasons, we find that the Executive Assistant to the Fire Chief
3 is a confidential employee within the meaning of Section 1 of the Law, and we dismiss
4 the petition.

5 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

ELIZABETH NEUMEIER, BOARD MEMBER

HARRIS FREEMAN, BOARD MEMBER