

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

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In the Matter of \* Case No. CAS-17-6266  
\*  
BOARD OF HIGHER EDUCATION \* Date Issued: June 27, 2019  
\*  
and \*  
\*  
ASSOCIATION OF PROFESSIONAL \*  
ADMINISTRATORS, MTA/NEA \*  
\*\*\*\*\*

CERB Members Participating:

Marjorie F. Wittner, Chair  
Katherine G. Lev, CERB Member  
Joan Ackerstein, CERB Member

Appearances:

Elizabeth M. Sullivan, Esq. - Representing Board of Higher Education  
Ryan Dunn, Esq. - Representing Association of Professional  
Administrators, MTA/NEA

1 **CERB DECISION**

2 **Summary**

3 On October 12, 2017, the Association of Professional Administrators/MTA/NEA  
4 (Union or APA) filed a unit clarification petition with the Department of Labor Relations  
5 (DLR) seeking to accrete a total of six different positions into its bargaining unit of  
6 professional administrative employees employed by the Board of Higher Education (BHE  
7 or Employer).

8 On January 22, 2018, the PSA withdrew its petition as to two of the positions, and  
9 the DLR proceeded to investigate the petition with respect to the remaining four positions:

- 1           1.           Executive Director for Marketing and Integrated Communications (ED  
2                   Marketing/Communications) – Fitchburg State University (Fitchburg  
3                   State)
- 4           2.           Executive Director of Development and Alumni (ED  
5                   Development/Alumni) – Framingham State University (Framingham  
6                   State)
- 7           3.           Executive Assistant to the Provost/Vice President (VP) of Academic  
8                   Affairs – Framingham State
- 9           4.           Executive Assistant to the Executive Vice President (EVP) of  
10                  Administrative and Finance (A&F).

11           On January 30, 2018, the Union and the Employer participated in an informal  
12 conference at the DLR's offices regarding these titles. Through position statements and  
13 exhibits submitted before and after the conference, the APA argues that the four positions  
14 are non-confidential, non-managerial positions that share a community of interest with  
15 other positions in its bargaining unit. The Employer contends that the two Framingham  
16 State Executive Assistant positions are properly excluded from the APA's unit pursuant  
17 to the terms of the parties' 2014-2016 collective bargaining agreement (2014-2016 CBA),  
18 and because they are confidential employees within the meaning of Section 1 of M.G.L.  
19 c. 150E (the Law). It further contends that the ED Marketing/Communications at  
20 Fitchburg State and the ED Development/Alumni at Framingham State should remain  
21 excluded based on the certain provisions in the 2014-2016 CBA, and because they are  
22 supervisory, managerial and/or confidential employees.

23           On May 10, 2019, the DLR sent the parties a letter asking them to show cause  
24 (Show Cause letter) why the unit placement dispute should not be resolved based on the  
25 information summarized therein. The Show Cause letter also requested some additional  
26 information. Neither party disputed the facts contained in the Show Cause letter or those  
27 that the BHE subsequently provided in response to the DLR's request for additional

1 information. After reviewing the responses and supplementing certain facts, the CERB  
2 has determined that there are no materially disputed facts and dismisses the petition as  
3 to all four positions for the reasons set forth below.

#### 4 Background

##### 5 Board of Higher Education

6 The BHE is the governing authority for fifteen community colleges and nine state  
7 universities including Fitchburg State and Framingham State.

##### 8 APA

##### 9 Initial Certification

10 On June 6, 1980, in Case No. SCR-2144, the former Labor Relations Commission  
11 certified the APA as the exclusive representative for a bargaining unit of professional  
12 employees in the state college system. The certification described the unit as "All full-  
13 time and regular part-time professional employees who regularly work twenty (20) or more  
14 hours each week occupying administrative positions at the State colleges..." The  
15 certification listed twenty-five titles that were included in the unit, including nineteen  
16 separate Director titles.<sup>1</sup> The title of "Staff Assistant" was also included, followed by a  
17 parenthetical stating, "except as any person in such position title [sic] is acting as the  
18 confidential secretary to, or the administrative assistant for, the President or Executive  
19 Vice President."

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<sup>1</sup> The Directors of Academic and Career Advising, Administrative Services, Computer Services, Financial Aid, Housing, Planning and Development, and Project were among those included in the original certification.

1 Part B of Appendix A of the original certification specifically excluded "All  
2 consultants and all CETA, managerial and confidential employees," as well nineteen other  
3 titles listed therein, including President, Executive Vice President, Vice President-  
4 Academic Affairs, Vice President-A&F, Vice President-Student Services, Assistant to the  
5 President, Director-Affirmative Action, Director-Facilities, Director-Fiscal Affairs, Director-  
6 Personnel, and several different Deans. The certification also expressly excluded the title  
7 of Staff Assistant, but "only as any person in such position title is acting as the confidential  
8 secretary to, or the administrative assistant for the President or Executive Vice President."

9 **2013 Unit Clarification Petition**

10 On August 5, 2013, the APA filed a unit clarification petition with the DLR in Case  
11 No. CAS-13-3029. The APA sought to accrete eighty-eight titles that were listed in Exhibit  
12 A to the petition, including a number of Staff Assistant positions at Bridgewater State,  
13 Fitchburg State, Framingham State, Massachusetts College of Art, Massachusetts  
14 Maritime, Salem State and Westfield State, including, in particular, the Staff Assistant to  
15 the Vice President of Academic Affairs at Framingham State, and a number of Staff  
16 Assistants to Vice Presidents at other campuses.

17 The parties subsequently bargained and narrowed the petition down to twenty-  
18 seven contested titles. In 2014, they entered into a Memorandum of Agreement (MOA),  
19 which resolved the petition in its entirety. Under the terms of the MOA, the Employer  
20 agreed to add twenty-four titles to the APA's unit in return for the APA withdrawing its  
21 petition with prejudice and agreeing not to contest the representation status of the  
22 remaining (non-accreted) positions listed in Exhibit A of the petition. Neither the Staff

1 Assistant to the Vice President of Academic Affairs at Framingham State nor any other  
2 Staff Assistants to Vice Presidents were accreted to the APA's unit pursuant to the MOA.

3 **The Composition and Scope of APA's Unit as of 2017**

4 As of the date of the petition, there were approximately 1500 employees in the  
5 APA's unit. The unit includes sixty bargaining unit members that supervise other positions  
6 within the unit by performing performance evaluations, hiring and recommending  
7 discipline.

8 The 2014-2016 CBA contains a recognition clause in which the Employer  
9 recognizes the APA as the exclusive representative of the titles listed in Appendix A to  
10 that agreement. Similar to the original certification, Appendix A contains separate lists of  
11 included and excluded titles. Part B of Appendix A continues to exclude all managerial  
12 and confidential employees and the persons holding the enumerated titles listed in that  
13 section. However, Appendix A of the 2014-2016 CBA differs from the original certification  
14 in several material ways.

15 First, the twenty-four excluded titles include a "Development" position, which is  
16 parenthetically described as "the position with primary responsibility for development in  
17 the University."<sup>2</sup> The parties first agreed to exclude the Development position during their  
18 negotiations for the July 1, 1995-June 30, 1998 CBA.

19 Second, all Vice Presidents "with or without a designation" are excluded from the  
20 unit.

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<sup>2</sup> The term "University" is defined elsewhere in the 2014-2016 CBA as "any one of the institutions that is denominated a "State University" pursuant to Massachusetts General Laws, Chapter 150A."

1 Third, the exclusion for Staff Assistant now includes not only persons who act as  
2 the “confidential secretary to, or the administrative assistant for the President or Executive  
3 Vice President,” but also persons who act in that capacity to “a *Vice President*.”<sup>3</sup> This  
4 change was made during negotiations for the 2014-2016 CBA.

5 Fourth, Appendix A to the 2014-2016 CBA includes a section titled, “New  
6 Positions,” which generally describes the procedure for determining the unit placement of  
7 new positions, including the parties’ agreement to refer disputes to the DLR for final  
8 adjudication. The parties added language to this section in 2011 stating that:

9 The title Executive Director shall be included in the unit when the position  
10 does not perform “confidential” or “managerial” duties as those are defined  
11 by G.L. c. 150E and interpreted by the Department of Labor Relations. Any  
12 dispute over the unit status of the Executive Director position shall be  
13 resolved by the Department of Labor Relations and is not grievable under  
14 Article XI, and may not be reviewed by an arbitrator.  
15

16 The APA contends that this language led them to file the instant petition over the two  
17 Executive Director positions at issue here.

#### 18 Disputed Titles

##### 19 **Fitchburg State**

##### 20 **Executive Director for Marketing and Integrated Communications**

21 The BHE first considered creating this position shortly after the University’s new  
22 president was appointed in July 2015. According to the BHE, it created the ED

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<sup>3</sup> The exclusion for Staff Assistant now states: “Staff Assistant . . . (only as such person in such position title is acting as the confidential secretary to, or the administrative assistant for the President, Executive Vice President or a Vice President).” For reasons that are unclear, however, the definition of Staff Assistant in the list of *included* titles was not updated to reflect this change.

1 Marketing/Communications based upon an identified need to have the organizational  
2 structure and functions of communications across Fitchburg State centralized, and the  
3 University's "brand" re-envisioned. The Assistant to the President had previously  
4 performed some, but not all of this position's duties.

5 The position was first posted on October 1, 2016 and filled in February 2017. The  
6 2016 posting stated in pertinent part:

7 General Statement of Duties: The Executive Director for Marketing and  
8 Integrated Communications will lead the institution's communications,  
9 marketing, messaging, public relations and branding activity. The executive  
10 director will have the opportunity to re-envision the organization structure  
11 and function of communications across the university with their team. The  
12 executive director. . . will report directly to the president and work with other  
13 senior leaders to promote the university, increase its visibility, support its  
14 vision and goals, attract the best students, recruit high-quality faculty and  
15 staff, and motivate alumni and donors. He or she will oversee university  
16 communications, publications and web, new and social media, as well as  
17 the marketing and communications aspects of advancement, admissions,  
18 athletic and graduate and continuing education. In addition, the successful  
19 candidate will play a significant role in community relations.  
20

21 The "Key goals and expectations" listed in the 2016 posting included:

- 22
- 23 • Use existing documents and additional research as required, develop and  
24 execute a strategic marketing and communications plan that includes  
25 measurable objectives and timelines;
  - 26 • Work closely with the Vice President for Advancement on a  
27 marketing/communications program that will increase private giving to  
28 Fitchburg State;
  - 29 • Determine how best to appropriate funding for the University's many  
30 communications initiatives;
  - 31 • Play a significant role in refining crisis and issues management strategies  
and responses.

32 The listed "Duties and responsibilities" included:

- 33
- 34 • Provide leadership and vision for a messaging and marketing strategy that  
35 advances Fitchburg State's missions and goals;
  - Manage communications for crises and other unanticipated events;

- 1 • Plan and oversee the design and production of all marketing, public  
2 relations and advertising projects;
- 3 • Direct the marketing, communications and public relations staff; and
- 4 • Strategically coordinate with all university departments to plan and execute  
5 integrated marketing campaigns.

6 Marilyn Siderwicz (Siderwicz) was hired as the ED Marketing/Communications in  
7 February 2017 and was the incumbent at the time of investigation. She supervises three  
8 APA members, the Director of Marketing, the Director of Public Relations and the  
9 Staff/Assistant/Digital Content Manager. Her supervisory responsibilities include  
10 assigning work, conducting performance evaluations, making decisions regarding hiring  
11 and firing, and either making or recommending disciplinary decisions. As of the  
12 investigation, she had not fired, or imposed or recommended discipline on any  
13 subordinate.

14 Siderwicz reports directly to Fitchburg State's president. She also sits on the  
15 President's Executive Cabinet, which meets bi-weekly to discuss matters such as the  
16 University's financial statements, decisions regarding the allocations of resources,  
17 strategic planning, and personnel and labor-related issues, such as student pay scale,  
18 new positions, dean on-boarding and work to rule. The Executive Cabinet consists of the  
19 President, the Vice President of Academic Affairs/Provost, the Vice President of Finance  
20 and Administration, the Vice President of Student Affairs, the Vice President of  
21 Advancement, Associate Vice President of Academic Affairs, Associate Vice President of



1 Human Resources/Payroll Services, the Assistant Vice President/CIO and Siderwicz.<sup>4</sup>

2 The Executive Cabinet is not a voting body.<sup>5</sup>

3 Siderwicz has control over her department's budget, but must consult with the  
4 President if an expense exceeds \$5,000.

5 Shortly after assuming her position, Siderwicz created or updated several  
6 documents. One document was titled, "Marketing and Integrated Communications Plan  
7 Objectives and Strategies – 2017-2020," which tied the objectives and strategies set forth  
8 therein to four University goals. For example, one University goal was, "Build a university  
9 community that embraces civic and global responsibilities." One of the objectives listed  
10 under that goal was to "Create messages and use the President's office email account to  
11 send urgent and important communications to the campus community. Play a significant  
12 role in refining crisis and issues management strategies and responses." Tied to the  
13 University goal to "Grow and strategically align Fitchburg State's resources," was the  
14 objective to "Complement enrollment goals with new marketing and communications  
15 strategies to ensure success."

16 Around the fall of 2017, Siderwicz directed her Staff Assistant Matthew Serafini  
17 (Serafini), an APA bargaining unit member, to assist her in modifying an existing

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<sup>4</sup> Based on the organization chart that BHE provided, all of these titles, except the Associate Vice President of Academic Affairs, report directly to the President. Two other titles also report directly to the President, the Special Assistant to the President, and the Director of Special Projects. Of these titles, however, only the Director of Special Projects is a member of the APA's bargaining unit.

<sup>5</sup> The President also meets separately on a weekly basis with the four vice-presidents. Siderwicz does not attend these meetings.

1 document titled "Visual Identity and Social Media" guidelines. Prior to Siderwicz being  
2 hired, Framingham State had only a few marketing and communications policies that  
3 included some basic social media account guidelines, simple color standards and  
4 statements about acceptable uses of university logos. Siderwicz modified these  
5 guidelines by establishing university-wide, uniform visual identity and social media  
6 guidelines, and provided detailed information about using Twitter and Facebook to  
7 support overall Fitchburg State branding. Siderwicz also added a section titled  
8 "Marketplace Marketing," and created a new Marketing and Communications project  
9 intake form. Upon completion, the guidelines were posted to the Fitchburg State's public  
10 relations website, where staff members can learn more about the services the marketing  
11 department offers.

12 Siderwicz is a member of Fitchburg State's Crisis Communications team, along  
13 with the Director of Public Relations, Serafini, and members of the President's Executive  
14 Cabinet. She is also Fitchburg State's official spokesperson in the event of an emergency  
15 or incident on campus.

16 Before hiring Siderwicz, Fitchburg State had a Crisis Communications plan, which  
17 outlines the "roles, responsibilities and protocols . . . to guide the university in promptly  
18 sharing information with all of Fitchburg State's audiences during an emergency or crisis."  
19 Part of Siderwicz's responsibility is to periodically review and update that plan. Siderwicz  
20 made some updates to the plan in 2017 and, in her role as both ED  
21 Marketing/Communications and a member of the Crisis Communications team, has  
22 provided feedback on other emergency-related documents since then.

1           **Bargaining Unit Status of Marketing and Communications Titles at Other**  
 2           **State Universities**

3  
 4           As set forth in the chart below, the titles and bargaining unit status of the highest-  
 5 ranking marketing and communications officials at other state universities/colleges varies  
 6 from campus to campus.

| State College or University   | Title                                          | Unit Status             |
|-------------------------------|------------------------------------------------|-------------------------|
| Bridgewater State             | VP for Marketing and Communications            | Non-unit position (NUP) |
| Framingham State              | Director of Marketing                          | APA                     |
| Framingham State              | Director of Communications                     | APA                     |
| Mass. College of Art & Design | Exec. Dir. of Marketing & Communications       | NUP                     |
| Mass. College of Liberal Arts | Director of Marketing and Communications       | NUP                     |
| Mass. Maritime                | No Position                                    |                         |
| Salem State University        | Ass't. VP for Marketing and Creative Services  | NUP                     |
| Westfield State University    | Exec. Director of Marketing and Communications | APA                     |
| Worcester State University    | Director of Marketing                          | APA                     |

7           **Framingham State**

8           **Executive Director, Development and Alumni Relations**

9           This position was first created and posted in 2003. The initial posting described  
 10 its role as "work[ing] with the alumni board, senior administrators, faculty, fund-raising  
 11 volunteers and trustees to implement a comprehensive and effective strategy to meet  
 12 Framingham State's fundraising goals." The first posting indicated that the position  
 13 reported to the Vice President of Administration and Finance, and served as a member  
 14 of the President's cabinet. Prior to 2003, the President and Chief Financial Officer were

1 responsible for the University's development activities and the Alumni Association  
2 handled its own alumni relations.

3 In 2006, some marketing and communications functions were added, and the  
4 position was retitled "Executive Director of College Advancement." When the position  
5 became vacant in 2008, it was reposted as "Vice President of College Advancement."

6 When that position became vacant in 2011, it was posted with its original title,  
7 Executive Director of Development and Alumni Relations. The 2011 posting indicated  
8 that the incumbent would lead all aspects of a comprehensive development office,  
9 including alumni relations and would report to the Executive Vice President.

10 Eric Gustafson (Gustafson) filled the position on February 6, 2012, and was the  
11 incumbent at the time of the investigation. Gustafson is in charge of all fundraising  
12 campaigns and executes them with little or no oversight. Gustafson also oversees how  
13 donations are directed and ensures that gifts comply with the donor's wishes.

14 Gustafson has created the following policies since 2012: Gift Acceptance Policy;  
15 Alumni Event Payment Policy; Credit Card Processing Policy; Gift Processing Policy,  
16 Foundation Credit Card Policy,<sup>6</sup> and Foundation Director Giving Guidelines.

17 Since August 9, 2014, Gustafson has reported directly to the President. Prior to  
18 that, he reported to the Executive Vice President Dale Hamel (Hamel). He travels with  
19 the President to donor meetings and is responsible for preparing the President for such  
20 meetings.

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<sup>6</sup> The Framingham State University Foundation is a non-profit entity whose purpose is to receive and manage gifts to the University. The Executive Director of Development also serves as the Executive Director of the foundation.

1 Gustafson sits on the President's Council, which last met in July 2017. There are  
2 approximately forty members of this Council including a number of Directors who are  
3 included in the APA unit. Gustafson also participates in monthly campaign meetings with  
4 the President and five other senior staff members<sup>7</sup> to discuss campaign progress, funding  
5 updates and upcoming events.

6 At the time of the investigation, six APA bargaining unit members reported either  
7 directly or indirectly to Gustafson. The direct reports were two Associate  
8 Directors/Development Officers and the Director of Alumni Relations. The indirect reports  
9 were the Assistant Director of Development; Staff Associate/Manager of Advancement  
10 Services; and the Staff Assistant/Alumni Relations Coordinator. Gustafson assigns work  
11 to these employees, evaluates them and makes recommendations for hiring, promotion,  
12 and discipline, as needed.

13 In March 2018, Gustafson was promoted, and his new title is Vice President of  
14 Development and Alumni Relations. In this capacity, a seventh APA member reports to  
15 him, the newly created Director of Development position.

16 As a result of his promotion, Gustafson now attends and participates in meetings  
17 of the President's Executive Staff, which consists of non-unit vice presidents and  
18 Framingham State's Chief Diversity and Inclusion Officer. Gustafson also sits on the  
19 President's Cabinet, which meets five times during the academic year. Labor relations

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<sup>7</sup> Other than the President and Gustafson, the Executive Vice President of Administration, Finance and Technology; Provost and Vice President for Academic Affairs; Vice President for Enrollment and Student Development; Chief Diversity and Inclusion Officer; and Chief of Staff /General Counsel attend these meetings.

1 matters, including collective bargaining and economic proposals, are discussed at  
2 Executive Staff meetings.

3 **Executive Assistant to the Executive Vice President of Administration,**  
4 **Finance and Technology**

5  
6 Since at least 1984, the EVP of A&F has had a non-bargaining unit administrative  
7 assistant to assist with administrative and clerical tasks. The incumbent in the position,  
8 Margaret Charbonnier (Charbonnier) has held the position since 2004 and has reported  
9 to Hamel, the EVP of A&F, since that time.<sup>8</sup>

10 Until 2007, Charbonnier was classified as an NUP Administrative Assistant II. A  
11 2004 posting for this title described the duties as setting up meetings; scheduling  
12 appointments; maintaining records and files; preparing correspondence; and recording  
13 budget information. Around 2007, Framingham State granted Charbonnier's request to  
14 reclassify her position as an NUP "Staff Assistant," which resulted in a pay raise.

15 The parties jointly submitted a job description dated October 25, 2017 for the  
16 reclassified title, which generally describes this position as providing primary support to  
17 the EVP of A&F and secondary support to the President's Office and other Executive Staff  
18 members' offices. In addition to the duties described in the 2004 posting, one of the  
19 essential duties listed in the 2017 description is "Exercise discretion with highly  
20 confidential information in all University matters on a daily basis."

21 Hamel shares an office suite with the NUP Chief Diversity and Inclusion Officer  
22 and an NUP Executive Assistant. Charbonnier sits outside Hamel's office within earshot

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<sup>8</sup> The parties do not dispute the managerial status of the EVP of A&F.

1 of all of his conversations. She open Hamel's mail, answers his phone, manages his  
2 calendar and files, and prepares documents for meetings, including preliminary budget  
3 documents before they are finalized. She is also privy to letters that Hamel signs notifying  
4 employees that they are being disciplined or terminated.<sup>9</sup> There have been at least ten  
5 terminations over the last three years.

6 Charbonnier also takes the minutes for all closed-door executive sessions for the  
7 Board of Trustees Finance Subcommittee.

#### 8 **Executive Assistant to the Provost/Vice President of Academic Affairs**

9 This position has existed since at least 2004. It was classified as an NUP  
10 Administrative Assistant II in 2004, but was posted at the end of 2010 as an NUP Staff  
11 Assistant with the functional title of Executive Assistant. The 2004 posting consisted  
12 primarily of the Commonwealth of Massachusetts classification specification for the  
13 Administrative Assistant series and did not contain any information specific to this title. A  
14 2010 posting for the position was more specific, indicating that the incumbent would:

15 [P]rovide support to the Vice President of Academic Affairs, Associate Vice  
16 President and departments/centers that report to Academic Affairs, as well  
17 as act as a liaison to other University departments and the faculty union.  
18 Areas of responsibility include maintaining faculty contracts and personnel  
19 files; creating and updating databases for personnel actions and budgets;  
20 overseeing student evaluation process; working closely with HR regarding  
21 adjunct hiring; coordinating special events and meetings; maintaining  
22 webpage; supporting and contributing to the University's diversity initiative  
23 and other duties as assigned. This position will also supervise a part-time  
24 administrative assistant.  
25

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<sup>9</sup> There is no evidence, and BHE does not contend that Charbonnier or Hamel are privy to draft collective bargaining proposals.

1 Under "Requirements," the posting stated, "This position requires handling confidential  
2 information with the utmost discretion."

3 A 2015 job description for this title was substantially the same as the 2010 posting,  
4 but clarified that the incumbent's handling of "highly confidential information" would  
5 include "[r]eceiving formal grievances from faculty and assisting Vice President [sic]  
6 throughout the entire process."

7 The incumbent Katelyn Christopher (Christopher) was appointed to the position on  
8 August 24, 2015. Christopher had previously worked as an NUP Administrative Assistant  
9 I in the same office from 2011 until she was promoted. At all material times, Christopher  
10 has reported to Dr. Linda Vaden-Goad (Vaden-Goad), the Vice President of Academic  
11 Affairs and Provost. Vaden-Goad serves as the Chief Academic Affairs Officer for the  
12 University, and sits on the BHE's bargaining team during contract negotiations with the  
13 Massachusetts Teachers Association/NEA, Massachusetts State College Association  
14 (MSCA). Christopher sits outside of Vaden-Goad's office.

15 Christopher answers Vaden-Goad's mail and has access to her files and shared  
16 drive. Christopher's labor and personnel-related duties include receiving formal faculty  
17 grievances, fielding student complaints against personnel, and creating and maintaining  
18 the database for personnel actions, such as reappointment, tenure, and promotion  
19 decisions. Christopher also has access to Vaden-Goad's email accounts, which, due to  
20 Vaden-Goad's position on BHE's bargaining team, include emails from BHE labor counsel  
21 and senior officials at other BHE campuses discussing management's bargaining  
22 proposals and strategies, grievances, and other labor relations matters.



1 There is also an NUP Administrative Assistant II in the Provost's office. An undated  
2 job description for this position indicates that the position has "significant access and  
3 exposure to confidential information concerning labor relations matters, management's  
4 position on personnel matters, and advance knowledge of the employer's collective  
5 bargaining proposals."

6 **Other NUP Staff Assistants/Associates at Framingham State**  
7

8 In addition to the NUP staff or administrative assistant titles previously mentioned,  
9 the Executive Assistant to the President and the Executive Assistant to the Vice President  
10 of Enrollment and Student Development are non-unit positions.

11 Opinion<sup>10</sup>

12 A unit clarification petition is the appropriate vehicle to determine whether newly-  
13 created positions should be included in a bargaining unit. Sheriff of Worcester County, 30  
14 MLC 132, 136, CAS-03-3543 (April 7, 2004). In analyzing whether a position should be  
15 accreted into an existing bargaining unit, the CERB considers: 1) whether the position  
16 was included in or excluded from the unit when the unit was originally recognized or  
17 certified; 2) whether the parties' subsequent conduct, including bargaining history,  
18 discloses that the parties considered the position to be in the bargaining unit; and 3)  
19 whether the position shares a community of interest with other positions in the existing  
20 bargaining unit. Town of Granby, 28 MLC 139, 141, CAS-3477 (October 10, 2001). If  
21 the first or second prong of the accretion analysis is conclusive as to a given position, the

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<sup>10</sup> The CERB's jurisdiction is not contested.

1 CERB will dismiss the petition without determining whether, under the third prong, the  
2 position shares a community of interest with other positions in the unit.

3 As explained below, the second prong is conclusive as to the two Executive  
4 Assistant positions and the ED Development/Alumni. Under the second prong of the  
5 accretion analysis, the CERB examines how the parties have treated the disputed  
6 positions in their dealings with each other and in their collective bargaining. City of  
7 Malden, 32 MLC 97, 100, CAS-04-3599 (November 2, 2005). The CERB will not accrete  
8 a position into an existing bargaining unit if the parties have executed a collective  
9 bargaining agreement demonstrating an intent to exclude the petitioned-for positions,  
10 unless the job duties of the position have changed materially. Commonwealth of  
11 Massachusetts, 30 MLC 156, 157, CAS-03-3539, 3540 (May 27, 2004) (citing Board of  
12 Trustees, University of Massachusetts, 8 MLC 1385, 1389 (1981) (additional citations  
13 omitted)). We dismiss the petition with respect to the following three positions on this  
14 basis.

15 **Executive Assistant to the Executive Vice President of Administration, Finance and**  
16 **Technology – Framingham State**

17 The record does not conclusively establish that this position existed when the unit  
18 was first certified in 1980. The first prong of the accretion test is therefore inconclusive as  
19 to this title.

20 As to the second prong, we conclude that Part B of Appendix A of both the  
21 certification and the CBA demonstrates the parties' intent to exclude this title without  
22 regard to whether the incumbent is a confidential employee within the meaning of Section  
23 1 of the Law.

1           We reach this conclusion for two reasons. First, the first sentence of Part B  
2 excludes “All consultants and all . . . managerial, confidential employees *and* all persons  
3 holding the following positions...” (Emphasis added). Because all managerial and  
4 confidential employees are already excluded pursuant to the first part of this sentence, it  
5 follows that the enumerated list of titles that follow this sentence are excluded regardless  
6 of whether they are managerial or confidential employees.

7           Second, because this title reports to an Executive Vice President, it falls under the  
8 exclusion in Part B for “Staff Assistant” . . . (only as any person in such position title is  
9 acting as the confidential secretary to, or the administrative assistant for the President,  
10 Executive Vice President or a Vice President).”

11           The use of the term “confidential” in this exclusion does not change this conclusion.  
12 Based on the wording and punctuation of the provision we conclude that the adjective  
13 “confidential” modifies only the term “secretary,” as in the position of “confidential  
14 secretary,” and not “administrative assistant.”<sup>11</sup>

15           We thus find that this section of the CBA demonstrates the parties’ intent to exclude  
16 all employees acting as an administrative assistant for an EVP, whether “confidential” or

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<sup>11</sup> We reach this conclusion because the definite article “the” precedes both “confidential secretary” and “administrative assistant.” Because the preposition “to” as well as a comma also separates these terms, the exclusion is reasonably construed as referring to Staff Assistants who either act as “confidential secretaries” or “administrative assistants” to the President, Executive Vice President or a Vice President. Our construction of this provision is in accord with the threshold statutory analysis in Commonwealth v. Stephen M. Jean-Pierre, 65 Mass. App. Ct. 162 (2005). There, construing the phrase “bodily injury that results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ,” the court considered a construction that applied “permanent” to modify only “disfigurement” to be the “most natural and sensible reading of the sentence structure in the statutory definition.” Id. at 163.

1 not. Where there is no evidence or argument that the Staff Assistant at issue does not  
2 serve in this capacity or that the duties of the position have materially changed, we  
3 dismiss the petition as to this title.<sup>12</sup>

4 **Executive Assistant to the Provost/Vice President of Academic Affairs -**  
5 **Framingham State**

6 The first prong of the accretion test is inconclusive because the record does not  
7 clearly establish that this position existed when this unit was first certified in 2000.

8 The second prong is conclusive, however, based on two agreements that the  
9 parties entered into that demonstrate their intent to exclude this title: 1) The 2013 MOA,  
10 in which Union agreed not to contest the bargaining unit status of the petitioned-for  
11 positions in CAS-13-2059 that were not accreted into the unit, including the Staff Assistant  
12 to the VP of Academic Affairs at Framingham State, the position at issue here; and 2) the  
13 2014-2016 CBA, in which, as discussed above, the parties agreed to exclude Staff  
14 Assistants who serve as administrative assistants to a Vice President.

15 Where there is no evidence and no party contends that the duties of the position  
16 have materially changed since 2013, the second prong of the accretion test is conclusive  
17 as to this title.

18 **Executive Director, Development and Alumni Relations – Framingham State**

19 Because there is no evidence that this position existed before 2004, the first prong  
20 is inconclusive. The second prong is again conclusive, however, based on the parties'

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<sup>12</sup> There is no dispute that the two Executive Assistant titles are Staff Assistants under the CBA who act as administrative assistants for the Provost/Vice President of Academic Affairs and EVP of A&F. In any event, both positions were previously titled Administrative Assistant, and there is no contention that their duties have significantly changed since then.

1 agreement in Part B of Appendix A of the 2014-2016 CBA, to exclude the "Development"  
2 position that is parenthetically described as "the position with primary responsibility for  
3 development in the University." Whether serving as the Executive Director of  
4 Development and Alumni Relations, or in the position to which he was recently promoted,  
5 the Vice President for Development and Alumni Relations, no party disputes that the  
6 position that Gustafson has held since 2012 is the position with "primary responsibility for  
7 development in the university." It is thus properly excluded from the unit pursuant to this  
8 agreement.

9 The fact that the parties agreed in 2011 to include all Executive Directors in the  
10 unit, unless they are confidential or managerial employees, does not change this result.  
11 The Development exclusion first appeared in the 1995-1998 CBA, and thus predates the  
12 ED exclusion by at least fourteen years. We reasonably presume that the parties were  
13 aware of the Development exclusion when they negotiated the ED inclusion language in  
14 2011, and thus could have, but did not, negotiate any exceptions to it based on this new  
15 language. Moreover, even though the ED inclusion language was negotiated in 2011,  
16 the same year that the ED Development/Alumni position was posted as an NUP title, the  
17 Union did not protest its exclusion from the bargaining unit until now. This further  
18 demonstrates that the parties did not intend the new ED language to override the  
19 longstanding bargaining unit exclusion for Development positions with primary  
20 responsibility for development. Finally, the fact that Gustafson has since been promoted  
21 to Vice President, and the recognition clause broadly excludes all Vice-Presidents, "with  
22 or without designation" provides a further basis to decline to accrete this title to the unit.

23 **Executive Director for Marketing and Integrated Communications – Fitchburg State**

1 Like the other titles, the first prong of the accretion analysis is inconclusive as to  
2 this position because it was first created around July 2015. As discussed above, however,  
3 since 2011, the parties have agreed to include Executive Directors in the unit, provided  
4 that they do not perform managerial or confidential duties within the meaning of the Law.  
5 In the absence of any other provisions in the CBA that exclude this title, the bargaining  
6 unit status of the ED Marketing/Communications therefore turns upon whether the  
7 incumbent is a managerial or confidential employee within the meaning of the Law. We  
8 conclude that Siderwicz's duties render her a managerial employee under the first part of  
9 the statutory definition, discussed below.

#### 10 Managerial Employee

11 Section 1 of the Law contains the following three-part test to determine managerial  
12 status:

13 Employees shall be designated as managerial employees only if they (a)  
14 participate to a substantial degree in formulating or determining policy, or (b) assist  
15 to a substantial degree in the preparation for or the conduct of collective bargaining  
16 on behalf of a public employer, or (c) have a substantial responsibility involving the  
17 exercise of independent judgment of an appellate responsibility not initially in effect  
18 in the administration of a collective bargaining agreement or in personnel  
19 administration.

20 An employee must be excluded from an appropriate bargaining unit under Section  
21 3 of the Law if the person's actual duties and responsibilities satisfy any one of the three  
22 statutory criteria referenced above. Town of Athol, 32 MLC 50, 52, CAS-04-3567 (June  
23 29, 2005).

24 To be considered a managerial employee under the first part of the managerial  
25 test, the employee must make policy decisions and determine mission objectives. City of

1 Boston, Boston Public Library, 37 MLC 1, 9, CAS-08-3727 (July 12, 2010) (citing  
2 Wellesley School Committee, 1 MLC 1389, 1401, MUP-2031 (February 27, 1975) *aff'd*  
3 *sub nom. School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112  
4 (1978)). The policy decisions must be of major importance to the mission and objectives  
5 of the public employer, Wellesley School Committee, 1 MLC at 1403, and the employee  
6 must participate in the policy decision-making process on a regular basis. Town of  
7 Plainville, 18 MLC 1001, 1009, MCR-4019 (June 12, 1991). To be considered policy, the  
8 decision must impact a significant part of the public enterprise. Worcester School  
9 Committee, 3 MLC 1653, 1672, MUP-2044 (April 29, 1977). To meet the standards  
10 established in the first part of the test, it must also be shown that the employee functions  
11 at levels of administration where decisions and opinions will not be screened by another  
12 layer of administration before being implemented. Id.

13         The BHE argues that Siderwicz meets the criteria of a managerial employee under  
14 the first part of the managerial analysis because she is a key figure for communications  
15 and marketing who “substantially participates” in determining policies on these issues.<sup>13</sup>  
16 The BHE emphasizes that Siderwicz reports directly to Fitchburg State’s president, who  
17 relies upon her to make decisions about how to accomplish its primary objective of  
18 continually increasing its visibility and reputation. The BHE also emphasizes Siderwicz’s  
19 role in emergency planning and crisis communications, including that she is Fitchburg  
20 State’s spokesperson in the event of an emergency or incident on campus.

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<sup>13</sup> The BHE does not contend that the ED Marketing/Communications meets the criteria set forth in the second and third parts of the managerial test.

1           The APA disagrees that the position is managerial, arguing that while important,  
2 the policies that Siderwicz develops are not central to the BHE's core mission of providing  
3 education. The Employer counters this argument by pointing to the 2016 posting for  
4 Siderwicz's position, which indicates that the incumbent "provides leadership and vision"  
5 for Fitchburg's messaging and marketing strategy, which "advances" Fitchburg State's  
6 "missions and goals."

7           We conclude that Siderwicz is a managerial employee based on the combination  
8 of factors cited by the BHE. The facts reflect that she has been vested with the broad  
9 discretion and authority, without any intervening layer of administration, to allocate  
10 resources for, and to create and update communications, marketing tools and strategies  
11 to implement the University's major goals on matters such as increasing enrollment and  
12 creating a community that embraces civic and global responsibilities. When this authority  
13 is coupled with the role she plays in formulating the University's crisis response policies,  
14 including sitting on the Crisis Team, updating crisis policies and serving as the  
15 University's official spokesperson during emergencies, we conclude that the duties of this  
16 position impact a significant part of the public enterprise, i.e., how Fitchburg State  
17 communicates with and presents itself to its internal and external constituents, particularly  
18 in times of crisis. What distinguishes this title from other public relations or marketing  
19 titles within Fitchburg State is that the ED Marketing/Communications reports directly to  
20 the President, and thus does not need anyone's approval, except perhaps the  
21 President's, to plan, develop, budget for, and enforce her initiatives.<sup>14</sup> Thus, while

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<sup>14</sup> There is no evidence that the President has ever modified or overridden any of Siderwicz's initiatives.



1 Siderwicz may not have ultimate responsibility for formulating the University's major goals  
2 for matters such as increasing enrollment and creating a community that embraces civic  
3 and global responsibilities, her role in formulating the "Marketing and Integrated  
4 Communications Plan – Objectives and Strategies, 2017-2020," demonstrates that she  
5 has the independent authority to advance those goals. In this regard, her role is similar  
6 to that of the Director of the Council of Aging (COA) in Town of Greenfield, 32 MLC 133,  
7 152, MUP-04-4178, CAS-04-3588 (February 8, 2006). There, even though the COA  
8 Director acknowledged that he worked under the policy direction of the Mayor and Council  
9 on Aging, the CERB determined that he was a managerial employee because he did  
10 more than just administer the town's elder services program, he had the independent  
11 authority to create, implement and enforce programs that he had created based on his  
12 assessment of the needs of the population. Id. We find that Siderwicz has comparable  
13 discretion and authority over Fitchburg State's marketing and communications initiatives,  
14 and thus decline to accrete her to the APA's unit.<sup>15</sup>

15 Conclusion

16 For the foregoing reasons, we decline to accrete the four petitioned-for titles to the  
17 APA's unit and DISMISS the petition in its entirety.

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<sup>15</sup> Based on our holding, we do not have to reach the BHE's alternative argument that Siderwicz is a confidential employee.

1 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

  
MARJORIE F. WITTNER, CHAIR

  
KATHERINE C. LEV, CERB MEMBER

  
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