

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

In the Matter of

MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY

and

MBTA EXECUTIVE UNION, USW, LOCAL 9501

Case No. CAS-20-8305

Date issued: May 16, 2025

CERB Members Participating:

Lan T. Kantany, Chair
Kelly B. Strong, Member
Victoria B. Caldwell, Member

Appearances:

Terence P. McCourt, Esq. - Representing the MBTA

Nicole Horberg Decter, Esq. - Representing the MBTA Executive Union, USW
Local 9501¹

CERB DECISION

Summary

1 The MBTA, Executive Union, USW, Local 9501 (Steelworkers or Union or
2 Executive Union) seeks to accrete six attorneys into its bargaining unit of professional
3 and supervisory employees employed by the Massachusetts Bay Transportation
4 Authority (MBTA or Authority). The MBTA contends that accretion is inappropriate for
5 several reasons, including that the attorneys are executive/managerial and/or confidential

¹ Attorney Randall Nash represented the Union during the hearing in this matter.

employees, and because the parties have agreed that some of the positions are excluded from the unit. The Union contends that all six attorneys share a community of interest with other bargaining unit members and should be accreted into the unit. For the following reasons, the Commonwealth Employment Relations Board (CERB) accretes the following positions to the Steelworkers bargaining unit: Senior Lead Counsel, Capital Delivery; Senior Lead Counsel, Contract; and Senior Counsel, Tort Litigation. It denies the petition to accrete the Senior Lead Counsel, Real Estate, and Senior Counsel, Regulatory Compliance into the unit for the reasons explained below. We grant the petition with respect to the GLX Program Counsel only if that position still exists.

Statement of Case

On November 9, 2020, the Union filed a unit clarification petition with the Department of Labor Relations (DLR) that sought to add 10 attorneys - six Senior Lead Counsels; three Senior Counsels; and one Project Counsel/Green Line Extension (GLX)² to its existing bargaining unit.

The DLR designated Marjorie F. Wittner, then Chair of the CERB, to serve as the Hearing Officer (Hearing Officer).³ On September 10, September 13, and September 14, 2021, the Hearing Officer conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. On September 7, 2021, the MBTA filed a motion to dismiss the petition on grounds of contract bar. The Hearing Officer took the motion under advisement. On October 12, 2021, the CERB issued a ruling

² This position is also referred to as the GLX Program Counsel, as explained in footnotes 40 and 44.

³ Ms. Wittner retired as CERB Chair in August 2024.

1 holding that the petition was timely and denied the motion to dismiss. The parties
2 subsequently filed post-hearing briefs.

3 **Stipulations of Fact**

4 Prior to the hearing, the parties entered into the following stipulations:

- 5 1. On January 24, 2001, the MBTA recognized the MBTA Executive Union as the
6 exclusive representative of a bargaining unit comprised of certain professional
7 and supervisory employees. See Joint Exhibit 1 consisting of the LRC Decision,
8 CR-3691, CR-3720 and Joint Exhibit 2 consisting of LRC Joint Exhibit 3
9 attached herein.⁴
10
- 11 2. The original bargaining unit consisted of 106 professional and supervisory
12 employees working in a variety of different departments of the Authority. As
13 shown on LRC Joint Exhibit 3, there are nineteen (19) lawyers listed in the
14 Authority's Legal Department. Eleven (11) of these lawyers were included in
15 the bargaining unit, while eight (8) were determined to be "executives." The
16 executive positions were General Counsel (1 position), Assistant General
17 Counsel (AGC) I (2 positions), AGC IV (3 positions handling labor/employment
18 matters) and AGC V (1 positions handling labor/employment matters). The
19 eleven lawyers in the bargaining unit had the titles of AGC II (1 position), AGC
20 IV (5 positions) and AGC V (5 positions). The lawyers in the bargaining unit
21 handled matters such as tort law, real estate law, contracts, and public records.
22 See Joint Exhibit 2.
23
- 24 3. As of March 31, 2021, the bargaining unit consisted of 156 employees. See
25 Authority Exhibit 1.
26
- 27 4. In or around 2013, the Authority posted the bargaining unit position of AGC II
28 (Design and Construction). See Joint Exhibit 3. This position was filled by Ann
29 DePierro. She held this position until she retired in 2019.
30
- 31 5. On or about March 2, 2015, the Authority hired Tracy Klay as an AGC I. See
32 Authority Exhibit 2. Klay is listed on Union Exhibit 8 as a Deputy General
33 Counsel, reporting directly to the General Counsel.
34
- 35 6. In or around 2016, the Authority hired Hildy M. Feuerbach [Feuerbach] into the
36 new executive position of Senior Real Estate Counsel. See Authority Exhibit
37 3. On Union Exhibit 8, Feuerbach is listed as reporting to Deputy General
38 Counsel Lauren Armstrong who, in turn, reported to the General Counsel.
39

⁴ The LRC refers to the Labor Relations Commission (LRC), the predecessor agency to the DLR and CERB, which were created in 2007.

- 1 7. In or around 2017, the Authority hired Ryan Ferch into the new executive
2 position of Senior Counsel. See Authority Exhibit 4. On Union Exhibit 8, Ferch
3 is listed as reporting directly to the General Counsel.
4
- 5 8. On or about October 29, 2017, the Authority hired Daniel Percac into the
6 executive position of GLX Program Counsel with the Greenline Extension
7 Program. See Authority Exhibits 5 and 6.
8
- 9 9. On April 10, 2018, the Union filed a petition to accrete the position of Senior
10 Real Estate Counsel then held by Hildy Feuerbach. See MTBA Executive
11 Union and Mass. Bay Transportation Authority, CAS-18-6625.
12
- 13 10. On January 15, 2019, the Union dismissed without prejudice its petition in CAS-
14 18-6625. See Authority Exhibit 7.
15
- 16 11. In January of 2019, Ms. Feuerbach was promoted to the position of Senior Lead
17 Counsel, Real Estate Counsel. See Authority Exhibit 8.
18
- 19 12. On July 28, 2019, Sarah Bellino was hired into the bargaining unit position of
20 AGC II reporting to Ms. Feuerbach. See Authority Exhibit 1.
21
- 22 13. In or around July of 2018, the Authority posted a new executive position titled
23 Senior Counsel, Tort Litigation. See Authority Exhibit 4.
24
- 25 14. In or around December of 2018, the Authority hired Scott Spencer into the
26 executive position of Senior Counsel, Tort Litigation. See Authority Exhibit 9.
27
- 28 15. On or about December 10, 2019, the Authority posted a new executive position
29 titled Senior Lead Counsel, Capital Programs. See Authority Exhibit 10.
30
- 31 16. On or about March 29, 2020, the Authority hired Roger LeBoeuf into the
32 executive position of Senior Lead Counsel, Capital Programs. See Authority
33 Exhibit 19.
34
- 35 17. In or about April 12, 2019, the Authority posted a new executive position titled
36 Senior Lead Counsel, Contracts. See Authority Exhibit 11.
37
- 38 18. On or about May 31, 2020, the Authority hired John Martin into the executive
39 position of Senior Lead Counsel, Contracts. See Authority Exhibit 12.
40
- 41 19. On October 9, 2020, the Union requested the current organization chart for the
42 Legal Department. On October 26, 2020, the Authority provided the Union with
43 a seven-page chart. See Union Exhibit 9.
44
- 45 20. On November 9, 2020, the Union filed the instant petition based on the job titles
46 set forth in Union Exhibit 9. The Union originally sought to accrete ten positions.

1 The Union no longer seeks two of the positions (Senior Lead Counsel
2 Procurement, and Senior Lead Counsel, Real Estate Development Projects)
3 because they are MassDOT positions. The Union continues to seek the
4 following positions as set forth in an attachment to its petition: ⁵

5
6 Senior Lead Counsel General Litigation
7 Senior Counsel Tort Litigation
8 Senior Lead Counsel Capital Delivery
9 Senior Lead Counsel Contracts
10 Senior Lead Counsel Real Estate
11 Senior Counsel Environmental
12 Project Counsel/GLX
13 Senior Counsel Regulatory Compliance
14

15 21. The collective bargaining agreement that was in effect at the time the petition was
16 filed had an effective date of July 1, 2014. See Joint Exhibit 5. The parties executed
17 a Memorandum of Understanding establishing the terms of this collective
18 bargaining agreement on April 15, 2015. See Joint Exhibit 6.

19
20 22. The interest arbitration award, which established the terms of the successor
21 agreement commencing on July 1, 2018, is dated January 5, 2021, and was issued
22 to the parties on January 6, 2021.

23 **Additional Findings of Fact**

24 **Background**

25 **M.G.L. c. 161A and Collective Bargaining**

26 The MBTA's enabling statute is M.G.L. c. 161A. Two sections address collective
27 bargaining rights and the scope of such bargaining. Section 25 grants directors the
28 authority to bargain collectively with labor organizations representing Authority
29 employees over wages, hours, and other terms and conditions of employment but

⁵ The Union indicated in its post-hearing brief that the Senior Counsel Environmental position was now vacant, and the Senior Lead Counsel General Litigation position was never filled. Because the Authority presented no evidence regarding the duties and responsibilities of those positions during the hearing, the Union requested that its claim for those positions be dismissed without prejudice. The CERB grants the request.

1 prohibits collective bargaining over the following “inherent management rights,” which
2 include the right:

- 3 • to direct, appoint, and employ officers, agents and employees and determine the
4 standards therefor;
- 5 • to discharge or terminate employees, subject to certain caveats not applicable
6 here;
- 7 • to plan and determine the level of service provided by the Authority;
- 8 • to direct, supervise, control, and evaluate the department’s units and programs of
9 the Authority; to classify the various positions of the Authority and to ascribe duties
10 and standards of productivity therefor;
- 11 • to develop and determine levels of staffing and training, subject to caveats not
12 applicable here;
- 13 • to determine whether goods or services should be made, leased, contracted for,
14 or purchased on either a temporary or permanent basis;
- 15 • to assign and apportion overtime;
- 16 • to hire part-time employees.⁶

17
18 The first paragraph of M.G.L. c. 161A, §26 excludes “directors,” “executives,” and
19 “confidential” employees from the definition of employees entitled to collective bargaining
20 rights.⁷ The CERB has construed these terms in a number of decisions discussed below.

⁶ Section 25 was enacted in 2000. Its predecessor, Chapter 161A, §19, was identical to Section 25 in all material respects. See Local 589, Amalgamated Transit Union v. MBTA, 392 Mass. 407, 413- 414, n.2 (1984) (citing full text of former Section 19).

⁷ The first paragraph of Section 26 states:

Notwithstanding any provisions of law to the contrary, the provisions of section 5 of chapter 150A shall so far as apt apply to the authority and its employees, excepting directors, executives and those confidential employees representing the authority and dealing with employee organizations.

The terms directors, executives and confidential employees are not defined in Chapter 161A beyond what is stated in Section 26.

1 Bargaining Unit History, 1994-2001

2 MBTA attorneys were not represented for purposes of collective bargaining until
3 2001, when, as the stipulations indicate, the MBTA recognized the Executive Union as
4 the exclusive representative of a bargaining unit that included certain attorneys. The
5 events leading to recognition began in 1994 when the Office and Professional Employees
6 International Union, Local 453 (Local 453) filed a petition with the former LRC seeking to
7 represent a separate bargaining unit of attorneys employed in the MBTA's legal
8 department.⁸ See MBTA and OPEIU, Local 453, 22 MLC 1111, CR-3689 (August 17,
9 1995). The MBTA opposed this petition on several grounds, including that the attorneys
10 were executives within the meaning of M.G.L. c. 161A, §19A.⁹ The MBTA also argued
11 that pursuant to Section 19(iv) of M.G.L c. 161A , the LRC lacked jurisdiction to consider
12 the questions raised by the petition.¹⁰ The LRC rejected the jurisdictional argument and
13 proceeded to analyze whether the attorneys were executives without collective bargaining
14 rights. In the absence of a statutory definition of "executive," the LRC sought guidance
15 from decisions arising under Chapter 150A and the National Labor Relations Act (NLRA).
16 In particular, noting that the United States Supreme Court in NLRB v. Bell Aerospace Co.,

⁸ At all relevant times, Local 453 has represented a bargaining unit of monthly payroll employees who perform administrative, investigative, fiscal, research, and technical functions within the MBTA's various departments. As described in the 1995 decision, Local 453 was originally certified around 1973. Although certain MBTA attorneys were included in the unit, the MBTA challenged their votes, and the challenges were never resolved. At some time after 1973, attorneys within the law department were placed on the executive payroll and not represented until 2001. MBTA, 22 MLC at 1124-1125.

⁹ Section 19A was repealed in 1999. It was identical, however, to the first paragraph of M.G.L. c. 161A, §26.

¹⁰ Section 19(iv) was repealed in 1999.

1 416 U.S. 267 (1974) had used the terms “executive” and “managerial” interchangeably,
2 the LRC proceeded to analyze whether the MBTA attorneys were “executives” under what
3 it deemed the “consistent” definition of managerial employees set forth in decisions
4 arising under Chapter 150A and the NLRA.¹¹ 22 MLC 1139-1141. In this discussion, the
5 LRC highlighted the Supreme Court’s decision in NLRB v. Yeshiva University, 444 U.S.
6 672 (1980) where, adopting the National Labor Relations Board’s (NLRB) definition,¹² the
7 Supreme Court stated that in applying the managerial exclusion set forth in Bell
8 Aerospace Co., 416 U.S. at 283, the relevant consideration is “effective recommendation
9 or control rather than final authority.” 22 MLC at 1140-1141. Combining the two
10 definitions, the LRC held that in determining whether the attorneys were executives, it
11 would “examine their duties to ascertain the degree to which [the attorneys] formulate and
12 effectuate [MBTA] policies, and exercise discretion within and independent of established
13 Authority policy.” Id. at 1140. In so doing, the LRC stated that it would examine two
14 factors: 1) the extent to which an employee directs and controls the operation and
15 performance of a department or major sub-division; and 2) the extent to which an
16 employee’s interests, in the exercise of discretion, become so closely aligned with that of

¹¹ Under Chapter 150A, the LRC discussed the Brookline Hospital decision in which the LRC determined whether employees were managerial by considering: “the extent of the individual’s input into policy making, especially labor relations; the extent of supervisory authority, especially appellate authority; the ability of the individual to alter or affect, on his own initiative and judgment, the working conditions of other employees; and the legitimate expectation of the employer of the continuing loyalty of the individual.” 22 MLC at 1139-1140 (citing Brookline Hospital, CR-3402 (January 28, 1974)).

¹² In Bell Aerospace, the Court defined managerial employees as those who “formulate and effectuate management policies by expressing and making operative the decision of their employer.” 416 U.S. at 288.

1 their employer, that their inclusion in any bargaining unit would lead to a divided loyalty
2 or conflict of interest. Id. at 1141.

3 As described in the LRC's 1995 decision, in 1994, the MBTA's law department was
4 headed by a general counsel and divided into four sections – Trial and Claims; Contracts;
5 Real Estate; and General Law, which handled legal matters not covered by the other
6 three sections. Each section head was an Assistant General Counsel who reported
7 directly to the General Counsel. Work was assigned by the General Counsel, through the
8 section heads to the individual attorneys. The General Counsel also decided whether to
9 retain outside counsel. Id. at 1128-1130.

10 Describing each of the sections, the LRC found that the Trials and Claims section
11 consisted of 10 attorneys and 11 additional personnel such as investigators and field
12 adjusters. This section primarily handled tort claims from the initial claim through trial and
13 appeal. Id. at 1131. In 1995, this section was headed by First Assistant General Counsel
14 Jonathan Feltner (Feltner), who reviewed all litigation assigned by the General Counsel,
15 monitored case flow and settlement processes, exercised general oversight of the claims
16 unit within the Trials and Claims section, which handled approximately 3,000 claims
17 annually, and monitored the performance of employees. Id. at 1131. Feltner delegated
18 case assignments and day-to-day supervision of the claims unit to other attorneys
19 subordinate to him and recommended the creation of new positions. Feltner also acted
20 as the General Counsel if the General Counsel was not available. The head of the claims
21 unit in 1995, James Condon (Condon) (whose current duties in the same capacity are
22 described in more detail below), directly or indirectly supervised approximately 10
23 employees who worked within the claims unit, handled some personnel matters on his

1 own and, on two occasions, imposed discipline after consultation with the General
2 Counsel. 22 MLC at 1131-1132.¹³ Within the Trial and Claims section, attorneys also had
3 specific tasks or specialties in litigation, including representing Local 589 bargaining unit
4 members if they were named in the litigation and acting within the scope of their
5 employment at the time of the accident. Id. at 1132.

6 The LRC found that the three attorneys who staffed the Real Estate section,
7 including the section head, dealt “primarily with legal issues that ar[o]se out of the
8 purchase of real estate, and other property law issues such as granting easements,
9 determination of property lines, and eminent domain matters from the initial takings
10 through trial.” These attorneys drafted “deeds, licenses, and other agreements required
11 for the use of real estate and provided advice concerning federal, state and local
12 environmental laws and regulations and the development of [MBTA] property.” Id. at
13 1133. There was no discussion of the Real Estate section head’s responsibilities other
14 than a footnote indicating that for some unspecified period of time, she had served as
15 Acting General Counsel. Id. at 1133, n. 35.

16 The LRC found that the Contracts section, then staffed by four attorneys, including
17 the section head, handled all MBTA contracts, including procurement and construction
18 contracts, prepared staff summaries of contracts submitted to the MBTA’s Board of
19 Directors for review and consideration, and provided opinions concerning whether the
20 MBTA could permissibly reject a bid, and its compliance with the statutory restrictions

¹³ Condon became president of the Steelworkers Union in 2000 and remained in that role as of the hearing, at which he testified.

1 regarding the privatization of state services. Id. at 1134. There was no separate
2 discussion regarding the section head's specific duties.

3 The General Law section was staffed by three attorneys, including the section
4 head. This section primarily handled all legal issues not covered by the other three
5 sections, including employment and labor law issues. One attorney within the section (not
6 the section head) addressed matters pertaining to private carrier issues, including
7 negotiating with other railroads such as Amtrak on mutual operating agreements and
8 other aspects of railroad law. She conducted administrative hearings dealing with private
9 carrier issues, reported findings, and made a recommendation to the MBTA Board of
10 Directors for review and action. Id. at 1135.

11 Applying the executive/managerial test described above to each of the four section
12 heads, the LRC held that Feltner, the head of the Trial and Claims section, was an
13 executive because the MBTA, through its general counsel, had delegated to him "a high
14 level of responsibility to manage and control the litigation of all claims involving the MBTA
15 and to exercise discretion to effectuate the MBTA's policies." Id. at 1141-1142. The LRC
16 found that the MBTA relied not only on Feltner's knowledge of the law and his expertise
17 and skills as a litigator, but also his abilities to direct the operation and performance of the
18 Trials and Claims section. Taking into consideration the "magnitude and importance of
19 the trials and claims section within the law department and the Authority as a whole," the
20 LRC concluded that Feltner was an executive employee and excluded from any
21 appropriate bargaining unit. Id. at 1142. Notably, the LRC reached this conclusion despite
22 characterizing Feltner's participation in formulating Authority policy as "minimal," and
23 "arguably, viewed as solely providing professional advice." Id. The LRC also excluded the

1 General Law section head as a confidential employee because she handled labor
2 relations litigation and routinely provided advice to personnel. Id. As to the Real Estate
3 and Contracts section heads, the LRC found the evidence “insufficient to determine with
4 any degree of certainty,” whether the Real Estate or Contracts section heads should be
5 excluded as executive employees.¹⁴ Id.

6 The LRC next considered whether any of the MBTA’s 15 assistant general
7 counsels, who reported to the section heads, were executives within the meaning of
8 Chapter 161A. With one exception, an assistant general counsel who performed labor
9 relations work, the LRC found that they were not, stating:

10 Although their work is based on their own professional competence in their
11 areas of expertise that requires the exercise of discretion and judgment, this
12 authority vested in them by the Authority is necessitated by the
13 requirements of their position and does not equate to the authority
14 delegated by an employer to its managerial or executive employees. . .
15 there is no evidence that these assistant general counsels participate to any
16 degree in the formulation of Authority policy.

17
18 Id. at 1142-1143.

19
20 As to whether the petitioned-for unit was appropriate, the LRC found that a
21 bargaining unit comprised solely of attorneys was inappropriately underinclusive, given
22 the Supreme Judicial Court’s admonition that bargaining units established pursuant to the
23 applicable provisions of Section 5 of M.G.L. c. 150A should be comprised of “the largest
24 number practically possible of employees having the requisite community of interest.” Id.
25 at 1143-1144 (quoting Jordan Marsh Company v. Labor Relations Commission, 316
26 Mass. 748, 751 (1944)).

¹⁴ The LRC determined that it did not need to address the issue further given its ultimate holding, discussed infra, that the petitioned-for unit was underinclusive. Id. at 1142.

1 The MBTA subsequently filed an action for declaratory judgment challenging the
2 LRC's jurisdiction over employees on the executive payroll. In 1997, the Supreme Judicial
3 Court issued a decision that concluded that the LRC had the authority to determine in the
4 first instance whether certain employees on the MBTA's executive payroll were exempt
5 executive employees. MBTA v. Labor Relations Commission, 425 Mass. 253 (1997).¹⁵

6 In the meantime, in July 1994, Local 453 filed a second petition (CR-3691) seeking
7 to represent *all* employees on the executive payroll, excluding directors, executives and
8 confidential employees. The LRC held that case in abeyance pending resolution of the
9 litigation surrounding CR-3689. When the LRC resumed processing CR-3691 in 1999, it
10 notified other labor organizations about CR-3691. In 2000, the Executive Union filed its
11 own petition (CR-3720) seeking to represent the same executive payroll employees
12 sought by Local 453. The LRC consolidated the matters for hearing. See MBTA and Office
13 and Professional Employee International Union, Local 453, AFL-CIO, CLC and MBTA
14 Executive Union, 27 MLC 67, CR-3691, CR-3720 (December 1, 2000).

15 In preparation for the hearing in the consolidated cases, the petitioners (MBTA
16 Executive Union and Local 453) and the MBTA entered into stipulations that, among other
17 things, designated each executive payroll position as follows: "E" for
18 executive/confidential positions to be excluded from collective bargaining; "S" for
19 supervisory positions to be included in a bargaining unit separate from those they
20 supervise: "P" for professional positions that should be given the opportunity to be
21 represented by a separate unit; "S/P" for positions that are both supervisory and

¹⁵ That decision involved a petition by Local 453 to represent lieutenants and captains in the MBTA's police department.

1 professional in nature; and “N” for non-supervisory, non-professional employees who
2 shared a community of interest with the employees in Local 453’s unit and should be
3 accreted into that existing bargaining unit. The stipulations referenced joint exhibits,
4 including “Joint Exhibit 3,” which listed all 590 executive payroll positions and their E, S,
5 P, S/P or N designation.¹⁶ Id. at 68. The parties requested that the LRC make the following
6 findings and rulings regarding the 590 positions:

- 7 1. That each of the positions listed on Joint Exhibit 3 in the category “E”
8 performs executive, managerial or confidential functions for the MBTA
9 to a significant degree and as a regular and substantial part of their
10 duties, within the meaning of M.G.L. c. 161A, Section 26.
11
- 12 2. With regard to executive and managerial employees, the parties
13 stipulate and the evidence confirms that their responsibilities typically
14 include, by way of example and not limitation: development and
15 implementation of MBTA policies, control of the operations and
16 performance of an MBTA department or subdivision, development and
17 implementation of management rights initiatives and policies pursuant
18 to M.G.L. c. 161A, Section 25, preparation of proposals and participating
19 in collective bargaining, administration and interpretation of collective
20 bargaining agreements, authority to decide and adjust employee
21 grievances, analysis, recommendation and decisions regarding staffing
22 levels, subcontracting, outsourcing and purchasing, and effective
23 recommendations regarding hiring, layoffs, discipline and discharge of
24 unionized employees.
25
- 26 3. With regard to confidential employees, the parties stipulate and the
27 evidence confirms that their responsibilities routinely involve matters
28 which could place or appear to place such employees in a position of a
29 real or apparent conflict of interest, including by way of example and not
30 limitation: participation in collective bargaining, legal representation in
31 labor and employment matters, certain aspects of personnel
32 administration, public relations, lobbying, access to and processing of
33 confidential information regarding drug testing, criminal records and
34 medical examinations, internal investigation of employees for security,
35 auditing or organizational diversity purposes, and directly assisting other
36 executive or confidential employees in a confidential capacity.
37

¹⁶ This is the same Joint Exhibit 3 referenced in Stipulation 1 in the instant proceeding.

1 5. That all of the positions with the following titles... (designated by
2 category "E" on Joint Exhibit 3) have duties and responsibilities which
3 warrant their exclusion from collective bargaining pursuant to M.G.L. c
4 161A, Section 26, as "directors," "executives" or "confidential"
5 employees.

6
7 Chief
8 Division Chief
9 Deputy Chief/Major
10 Section Chief
11 Director
12 Assistant Director
13 ***
14 General Counsel
15 Deputy General Counsel
16 Assistant General Counsel I

17 Id. at 68-69.

18 Following its recitation of these stipulations, the LRC determined that the parties'
19 proposed bargaining units did not appear to conflict with M.G.L. c. 150A, §5, M.G.L. c.
20 161A, §26, or established LRC policy or precedent applicable to the MBTA. As such, the
21 LRC adopted the parties' agreement and found that the proposed units were appropriate
22 for collective bargaining, including the unit at issue here consisting of:

23 [A]ll full-time and regular part-time supervisory and professional executive
24 payroll employees designated as "SL," "P," and "S/P" on joint exhibit three. .
25 , excluding all executive payroll employees designated as "E," and "N" on
26 joint exhibit 3 and further excluding all directors, executives and those
27 confidential employees representing the Authority and dealing with
28 employee organizations, and all other employees of the [MBTA].

29
30 Id. at 70.

31 In 2001, the MBTA recognized the Executive Union as the unit's exclusive
32 representative.¹⁷ The 590 employees who had been on the MBTA's executive payroll
33 were split between Local 453's existing unit and the Executive Union; 222 employees

¹⁷ The LRC never conducted an election in the unit.

1 were transferred from the executive payroll to Local 453, 106 became members of the
2 new Executive Union, and the remaining 262 employees stayed on the executive payroll.

3 The Union and the MBTA subsequently entered into a series of collective
4 bargaining agreements (CBA), including one effective from July 1, 2018 to June 30, 2021.

5 The recognition clause of that agreement states:

6 A. Pursuant to the December 1, 2000 Decision of the [LRC] in Case Nos.
7 CR-3691 and CR-3720 and the Authority's formal notification dated January
8 24, 2001, the [MBTA] recognizes the union as the exclusive collective
9 bargaining representative of all positions identified as supervisory and/or
10 professional in "Joint Exhibit 3," attached to the decision.

11
12 B. The Authority and the Union shall determine questions regarding the
13 inclusion or exclusion of jobs by mutual agreement where possible using
14 the basis for inclusion and exclusion of jobs as determined by the [LRC] in
15 the [2000 Decision], and otherwise by submission to the [LRC] for
16 resolution.¹⁸

17 As of March 31, 2021, the bargaining unit consisted of 156 employees, an increase
18 of 50 employees since 2001. The salaries for the professional employees, including the
19 attorneys, ranged from \$73,667 to \$143,653 across three classifications.

20 Structure of Legal Department - 2000

21 As of the 2000 decision, there were nineteen attorneys in the MBTA's legal
22 department in the following titles: General Counsel, Deputy General Counsel and
23 Assistant General Counsels I – V. As part of the proceedings described above, the parties
24 agreed to designate 11 attorneys as professional or supervisory employees who were
25 included in the unit, and to exclude eight as executives. The executive titles included one
26 General Counsel, one Deputy General Counsel, and two Assistant General Counsel Is.

¹⁸ The same recognition clause also appeared in the 2006-2010 agreement. See MBTA,
36 MLC 21, 23, WMAP-08-1001 (August 5, 2009).

1 The two Assistant General Counsels I were the Chiefs of their respective departments -
2 Litigation and Claims (Feltner), and Contracts (Gerald Kelley). Both Feltner and Kelley,
3 as well as the excluded Deputy General Counsel, reported directly to the General
4 Counsel.

5 Also excluded were three Assistant General Counsel IVs who handled labor and
6 employment matters, and one Assistant General Counsel V, Mary Logalbo (Logalbo), the
7 Chief of General Litigation, who, like Feltner and Kelley, reported directly to the General
8 Counsel, and handled labor and employment matters. The lawyers who were not
9 excluded handled a range of tort, contract, and public records matters and one lawyer
10 who handled real estate matters, Mary Ellen Boyle, an Assistant General Counsel II.

11 Transportation Reform Act of 2009

12 Prior to 2009, the employees who performed in-house legal services for the MBTA
13 were employed by and did work exclusively for the MBTA. In 2009, the Legislature
14 enacted the Transportation Reform Act (TRA), which placed employees working at an
15 array of state transportation agencies and authorities, including the MBTA, under the
16 oversight of the Massachusetts Department of Transportation (MassDOT), a new state
17 agency. See M.G.L. c. 6C, §2.¹⁹ M.G.L. c. 6C, §5A states that MassDOT “shall be
18 organized and shall function as a single state agency for administrative purposes.” This
19 provision also authorized the Secretary of MassDOT to identify and consolidate certain
20 “core administrative functions,” including “legal functions.”

¹⁹ In MBTA and Transportation Executives Association (TEA), 36 MLC 199, WMAP-09-1002 (May 26, 2010), the CERB held that the TRA did not affect the CERB’s jurisdiction to establish and determine appropriate MBTA bargaining units pursuant to M.G.L. c. 161A, §26.

1 Subsequently, several positions in the MBTA's law department were transferred
2 from the MBTA to MassDOT, including, most notably, the General Counsel and Deputy
3 General Counsel positions. Despite progress in consolidating the law department's
4 leadership functions, staff attorneys generally remained grouped by the agency or the
5 authority they worked for, rather than by their area of expertise, until the 2019
6 reorganization described below.

7 Post-2009 Changes to MBTA Leadership and Legal Department

8 During the winter of 2015, a flood of weather-related commuter rail and subway
9 breakdowns, cancellations, and delays led then Governor Baker to appoint a Fiscal
10 Management and Control Board to review the MBTA's structure and services and to make
11 recommendations for improvement. On April 8, 2015, the panel issued a report that,
12 among other things, recommended the creation of a Fiscal Management Control Board
13 (FMCB) that would report to the Secretary of Transportation and replace the MassDOT
14 Board. The Legislature subsequently created the FMCB, which oversaw MBTA
15 operations until 2021.

16 Around 2012, the MBTA recognized the Transportation Executives Association
17 (TEA), a unit comprised of certain former executive payroll positions. Within the legal
18 department, TEA represents employment lawyers.

19 During 2015-2020, there were several changes that affected MBTA lawyers'
20 processes and workload. The 2015 legislation that created the FMCB also provided for a
21 three-year waiver of the so-called "Pacheco" law, which had the effect of easing
22 restrictions on outsourcing procurements and services and created new procurement
23 duties for certain MBTA attorneys. From 2018 until September 2020, the MBTA increased

1 capital spending from \$875 million to \$1.676 billion. Spending included \$1.36 billion for a
2 Green Line Extension (GLX) project that would extend the existing Green Line Service
3 into Medford and Somerville. This project led to the creation of the GLX Program Manager
4 position at issue here.

5 At some point in the mid-2010's, the legal department also became known as the
6 Office of the General Counsel. In 2018, that office was led by General Counsel Marie
7 Breen (Breen), a MassDOT employee. An organization chart dated 2018 shows that
8 Breen had seven employees who reported directly to her: Deputy General Counsel
9 Lauren Armstrong (Armstrong), Deputy General Counsel Susan Cobb (Cobb), Deputy
10 General Counsel Feltner,²⁰ Senior Counsel Ryan Ferch (Ferch), Assistant General
11 Counsel V Rachel Morse (Morse),²¹ and Deputy General Counsel Tracy Klay (Klay). All
12 of these titles except Morse, a Steelworkers unit member, were on the executive payroll.
13 Except for Feuerbach, who was identified as "Counsel, Sr Real Estate, the chart did not
14 identify the practice areas of any of the employees. The organization chart also showed
15 two executive payroll attorneys with the title of "Senior Counsel". As the stipulations
16 reflect, Feuerbach reported to Armstrong who, in turn, reported directly to Breen. Ferch
17 supervised four TEA attorneys.

²⁰ Feltner's title changed from Assistant General Counsel I to Deputy General Counsel around 2016. He retired in 2018.

²¹ Morse testified without rebuttal that the 2018 organization chart was wrong – she never reported directly to Breen.

1 Successor Negotiations and CAS-18-6225

2 Sometime in 2018, the parties began bargaining for a successor to their 2014-
3 2018 CBA. After several bargaining sessions, they petitioned for mediation with the DLR,
4 and they began negotiating under the auspices of a DLR mediator. During early
5 successor negotiations, the Union proposed amending the CBA's recognition clause to
6 include some new positions, including Feuerbach's Senior Counsel, Real Estate position.
7 The MBTA did not agree to the proposal.

8 In April 2018, the Union filed a unit clarification petition with the DLR (CAS-18-
9 6625) seeking to accrete the Senior Counsel, Real Estate position to its unit.²² The Union
10 described the position as a professional position that shared a community of interest with
11 the other lawyers in the bargaining unit.²³ At some point while CAS-18-6625 was pending
12 Armstrong, who previously served as Feuerbach's supervisor, left the Authority,

13 In January 2019, the parties discussed settling CAS-18-6625. On January 14,
14 2019, Senior MBTA Labor Counsel Maryam Portnoy (Portnoy) sent an email to Union
15 Attorney Randall Nash (Nash) that stated in pertinent part:

16 You have asked us to reduce to writing the MBTA's plans for the Real Estate
17 Counsel positions. Hildy Feuerbach is in the process of being promoted
18 from the Senior Real Estate Counsel position to the Senior Lead Counsel-
19 Real Estate position and will be overseeing DOT and MBTA legal services.
20 In this position, Hildy will have one DOT and one MBTA real estate attorney
21 reporting to her. Hildy's current position is being eliminated.

22
23 Following the standard position approval process, we will also be creating
24 the MBTA real estate counsel position which will be represented by the

²² The CERB takes administrative notice of the case file in CAS-18-6625.

²³ The Union did not seek to accrete the other Senior Counsel position at that time based on the 2018 organization chart that showed Ferch reporting directly to Breen and supervising four TEA attorneys.

1 Steelworkers Union and will report to Hildy. Can you please confirm our
2 understanding that based on the above, the Union's pending position will
3 be withdrawn.

4 Nash replied on January 14, 2019 as follows:

5 I have consulted with my client. Your email provides an adequate basis for
6 the dismissal of the pending position, without prejudice. I know that you
7 and Ahmad [Barnes]²⁴ said you could not commit to a date certain by which
8 the changes will occur. However, if the changes you have described,
9 including the filling of the MBTA Real Estate Counsel as a Steelworkers
10 position, do not occur within a reasonable time, the Union reserves its right
11 to petition to accrete Ms. Feuerbach's position.
12

13 Thank you for your efforts in resolving this matter. We look forward to the
14 posting and filling of the new Steelworkers position.
15

16 On January 15, 2019, Feuerbach was promoted to Senior Lead Counsel, Real
17 Estate, and the Union withdrew CAS-18-6625 without prejudice. At the time of the
18 withdrawal, Union President Condon assumed that once Feuerbach was promoted, she
19 would report directly to Breen, as Armstrong had. As set forth below, however, this
20 assumption was incorrect.

21 2019 Legal Department Reorganization

22 While CAS-18-6625 was pending, the MBTA was reorganizing its legal department
23 from its 2018 structure that grouped its administrative and legal staff into four "Centers of
24 Excellence" (COE): Commercial Transactions; Litigation; Corporate and Regulatory
25 Compliance; and Labor and Employment. Each COE was led by an executive payroll
26 "Managing Counsel," who reported directly to General Counsel Breen with dotted line

²⁴ At all relevant times, Ahmad Barnes (Barnes) was the MBTA's Director of Labor Relations. He testified at the hearing.

1 reporting authority to a position titled "Chief Counsel, MBTA."²⁵ Each COE in turn was
2 divided into practice areas, which were overseen by MassDOT or MBTA Senior Lead
3 Counsels or Senior Counsels, who oversaw the operations and staff of their particular
4 practice area.

5 The MBTA did not inform Condon or the Union before reorganizing the legal
6 department into COEs, and the Union was not aware of it when it withdrew CAS-18-6625.

7 2019-2020

8 On February 15, 2019, about a month after the Union withdrew CAS-18-6625, and
9 while the parties were still mediating the terms of the successor CBA, Nash sent an email
10 to Portnoy regarding "Disputed Positions." The email stated in part:

11 The [Union] expects to submit its last best offer to the mediator
12 tomorrow...You will see that we have deleted the positions that were listed
13 in our Article 1 proposal. The listed positions were either resolved or no
14 longer at issue. Moreover, an interest arbitrator lacks jurisdiction to resolve
15 accretion issues. For the record, I want to be clear that the Union is still
16 claiming an interest in at least 3 newly- created positions....

17
18 Mike Hulak, Deputy Director Para Transit Operations
19 Carol Joyce Harrington, Deputy Director, Para Transit Administration
20 Scott Spencer, Senior Counsel Tort Litigation²⁶
21

²⁵ On the 2020 organization chart, several other positions were shown reporting directly to Breen: One Chief Compliance Officer, two Chief Counsels (MBTA and RMV), a Deputy General Counsel, Alternative Project Delivery and Special Projects, and Cobb, who served as First Deputy Counsel for DOT and MBTA. None of those positions are at issue in this proceeding. Cobb testified at the hearing.

²⁶ The Deputy Director positions are not at issue in this proceeding. The remaining Senior Counsel, Tort Litigation position was first posted in 2018 and filled in December 2018 by Spencer. It did not appear on the 2018 organization chart. The 2020 organization chart shows Spencer holding the "Senior Lead Counsel, General Litigation" position, but the record reflects that this position was never finalized, approved, or filled. Instead, since December 2018, Spencer has held the Senior Counsel, Litigation position at issue here.

1 We look forward to continuing to discuss these positions. We also reserve
2 the right to seek to accrete these positions, as well as any other appropriate
3 positions.

4 On March 15, 2019, the Union moved the matter to interest arbitration pursuant to
5 M.G.L. c. 161A, §29. Arbitration hearings were held from the fall of 2019 until the summer
6 of 2020. One of the interest arbitration exhibits was a list of current Steelworker positions.
7 There were eight Assistant General Counsel positions, grades II-V. Most of the other titles
8 were “Manager” positions including Assistant Managers, Project Managers, Senior
9 Project Managers, and Senior Technical Project Managers.²⁷

10 In April and December 2019, respectively, the MBTA posted and filled two of the
11 new Senior Lead Counsel positions – Senior Lead Counsel, Contracts, and Senior Lead
12 Counsel, Capital Programs. The Senior Lead Counsel, Capital Programs job description
13 stated that the incumbent “reports directly to Managing Counsel, Commercial
14 Transactions.” The Senior Lead Counsel, Contracts job description indicated that the
15 incumbent worked “under the direction of the General Counsel and Managing Counsel,
16 Commercial Transactions.” The MBTA posts all job postings on their website and emails
17 them to all employees and job leaders. The MBTA does not fill all the positions it posts.²⁸

18 On October 9, 2020, the Union requested an updated Legal Department
19 organization chart. On October 26, 2020, the MBTA provided it with multi-page 2020

²⁷ Some of the Project Manager positions were broken out further by specialty, i.e., Project Manager, Construction; Project Manager, Track; Manager, Senior Project Manager, Bridge, etc. There were also 19 “supervisors,” including three in Customer Support and nine in “Ops Control Center.”

²⁸ Condon credibly testified that although he may have received the postings, he had no memory of doing so.

1 organization chart (2020 organization chart) that showed the staffing for the new COEs.
2 On October 29, 2020, Condon sent an email to Portnoy requesting job descriptions for all
3 the Senior Lead Counsel positions appearing on that chart. Nash followed up with an
4 email to Portnoy on November 3, 2020, indicating that the latest organization chart
5 contained some positions that might be appropriate for inclusion in the bargaining unit.
6 The Union filed the instant unit clarification petition on November 9, 2020.²⁹

7 As of 2021, the Legal Department consisted of 65 staff, including attorneys,
8 paralegals, administrative assistants and claim assistants.

9 Disputed Positions, Generally

10 In general, the Senior Lead Counsels work with MBTA and MassDOT executives
11 and bargaining unit members on matters that span both agencies. As described below,
12 they may work on matters that go before the Board of Directors of the MassDOT or the
13 MBTA, but they do not make the presentations. Their duties include providing advice to,
14 and attending meetings with executives/senior staff, covering for Managing Counsel in
15 their absence, managing outside counsel, and staffing and assigning work to other
16 personnel in their practice area. Their duties do not include having the independent
17 authority to make policy decisions.³⁰

18 Senior Lead Counsels attend weekly senior management meetings attended by
19 Breen, Cobb, the Managing Counsels and Spencer, the Senior Counsel Tort Litigation.

²⁹ The interest arbitration award issued in January 2021. The award does not address any unit composition issues.

³⁰ On cross-examination, Managing Counsel for the Commercial Transactions COE, Al Caldarelli (Caldarelli) agreed that none of the lawyers in his department had the independent authority to create policy.

1 The meetings last between 45 minutes and an hour. The meetings are intended to provide
2 consistency in legal positions across MassDOT and the MBTA. Topics of discussion
3 include issues that could affect other COEs or that are going to be presented to the
4 MBTA's General Manager or Board of Directors. Before the meetings, Caldarelli asks his
5 Senior Lead Counsels to provide updates on key legal matters, including matters that the
6 attorneys in their practice areas have identified as "hot topics" for discussion.

7 Petitioned-for Positions in Commercial Transactions COE

8 The Commercial Transactions COE is managed by Caldarelli and consists of four
9 separate practice areas: Capital Delivery, Contracts, Real Estate, and Procurement.³¹
10 The Union seeks to accrete the Senior Lead Counsels for Capital Delivery, Contracts and
11 Real Estate. The duties and responsibilities of these positions are discussed below.

12 Roger LeBoeuf – Senior Lead Counsel, Capital Delivery

13 There are two attorneys in the Capital Delivery practice area – Senior Lead
14 Counsel LeBoeuf and Counsel David Gorman (Gorman). Gorman is a member of the
15 Steelworkers bargaining unit.

16 The MBTA posted LeBoeuf's position on December 19, 2019 and hired him in
17 March 2020 at an annual salary of \$120,000.³² The posting summarized the position as
18 follows:

19 The Senior Lead Counsel, Capital Programs, will provide management,
20 counsel, representation and supervision of the Capital Program Practice
21 with the Commercial Transactions Center of Excellence. The Senior Lead

³¹ The Union withdrew its request to accrete Senior Lead Counsel, Procurement, after learning that it was a MassDOT position.

³² The salary range on the posting was \$110,000-\$130,000 annually. As of 2021, LeBoeuf was earning \$125,461.

Counsel reports directly to the Managing Counsel, Commercial Transactions, and is accountable for delivering excellent legal services to advance the delivery of MassDOT and MBTA's capital program including procurement, design and construction. The Senior Lead Counsel provides supervision and management of in-house attorneys and outside counsel.

Other duties on the posting include:

- Provide management and oversight of MassDOT and MBTA Capital Programs related matters within the Office of the GC, including the supervision of attorneys and support staff.
- Determine policy pertaining to MassDOT and MBTA design and construction procurement and transactions, interests and strategic plans.
- Provide legal advice and support to design and construction projects.
- Provide legal advice for construction and transit-oriented development projects including with respect to procurement and contract matters.
- Draft policies and procedures surrounding the procedures and legal implications.
- Draft, negotiate, review and finalize design and construction legal and procurement documents.
- Engage and oversee the work of outside legal counsel to represent MassDOT and MBTA during procurements and contract delivery.
- Prepare summaries of complex transactions for the General Counsel's office, the General Manager's office, the Secretary, the Board of Directors and senior management.
- Support the development of the Office of General Counsel budget.
- Provide strategic advice and assistance to the MBTA on initiatives involving delivery of the capital program and on proposed legislation.
- Review and approve documents and agreements prior to approval as to form by the [General Counsel's Office] and execution.
- Interpret court decisions and opinions, statutes, rules and regulations applicable to the MBTA.³³

Specific Examples of LeBoeuf's Duties

Capital programs can include improvements to subway and commuter lines, as well as design-build projects. LeBoeuf's background is in construction law, and he handles matters pertaining to various capital delivery programs at all stages of the process, from procurement to contract performance to overseeing any litigation that may

³³ LeBoeuf testified that the posting generally reflected his duties and responsibilities.

1 arise at the procurement or performance stages. LeBoeuf's procurement duties include
2 reviewing and signing off on initial requests for qualifications and proposals (RFQ and
3 RFP).

4 At the time of hearing, LeBoeuf was working on a major \$70 million design-build
5 project to lay fiber optic cable throughout most of the commuter rail system (Fiber Optic
6 Resiliency Project). His duties on that project included working with the fiber optic team
7 and outside counsel to develop procurement proposals and draft the contract that was
8 included with the RFP. He reviewed the RFQ and RFPs for compliance purposes. On this
9 project and others, he handled complaints and requests for extensions of time from CIM,
10 a trade organization that represents Massachusetts construction industries.

11 Outside of this project, LeBoeuf's duties have included developing and modifying
12 contract templates and language. Working with Gorman and others, he helped develop a
13 new design-build contract template. As of the hearing, he was drafting new "General
14 Conditions" language in the standard contractor contract that included a new mediation
15 provision and a cap on the amount of damages that contractors can seek for delays in
16 performance. LeBoeuf intended to submit the policy to Breen and Caldarelli for approval
17 once the policy is completed.

18 LeBoeuf has also been involved in a Small Business Initiative to encourage small
19 businesses to bid on small MBTA contracts. LeBoeuf initially assigned Gorman to draft a
20 model contract, but LeBoeuf took over leading the draft the template to ensure that it
21 conformed to state procurement laws. Upon completion of the template, LeBoeuf
22 intended to keep Gorman involved by having him do first drafts of contracts based on the
23 template, which would then be reviewed by LeBoeuf and ultimately submitted to Caldarelli

1 and Breen for approval. A similar process would be in effect for drafts of the design-build
2 contract template. It is LeBoeuf's practice to run major policy decisions by Caldarelli and
3 Breen.

4 Regarding staffing and other personnel matters, Caldarelli has asked both LeBoeuf
5 and Martin to "think" about staffing issues. He has delegated case assignments, day-to-
6 day supervision, and workload adjustments to them, but they do not have the independent
7 authority to make transfer decisions. Rather, they can only recommend such action to
8 Caldarelli. More specifically, LeBoeuf assigns and reviews Gorman's work. He has also
9 conducted training for other capital delivery staff on delay and force majeure contract
10 provisions. LeBoeuf has sign-off authority on change-orders for up to \$500,000 as to
11 form-only.³⁴ His is not the final signature on the document. He does not sign off on
12 proposed budgets from outside counsel.

13 John Martin – Senior Lead Counsel, Contracts

14 As of 2021, there were three attorneys in the Contracts practice, Martin, Ingrid
15 Freire (Freire), and Percac. Freire is a Counsel II employed by MassDOT and reports to
16 Martin. She is a member of the bargaining unit represented by the National Association
17 of Government Employees (NAGE). As described below, Percac reports directly to
18 Caldarelli, not Martin.

³⁴ According to a July 1, 2020 memo regarding "Delegation of Authority" from the Chief of Capital Programs, prior to signing, the legal department must be consulted for change orders over \$500,000 and for "any deviations from the standard legal template, any bidding irregularities conflict of interest issues or other legal issues." Gorman has no sign off authority.

1 The MBTA posted Martin's position in 2019 and hired him in June 2020 at an
2 annual salary of \$130,000.³⁵ The posting summarized the position as follows:

3 The Senior Lead Counsel – Contracts will provide management, counsel,
4 representation and supervision of the Contracts Practice within the
5 Commercial Transactions Center of Excellence, under the supervision of
6 the General Counsel and Managing Counsel – Commercial Transactions.
7 The Senior Lead Counsel-Contracts is responsible for providing strategic
8 leadership to transform the way MassDOT and the MBTA do business in
9 the marketplace.

10
11 Other duties on the posting included:

- 12
- 13 • Work in close collaboration with Senior Lead Counsel Procurement to
14 provide advice and counsel to the business units of MassDOT and the
15 MBTA on contract-related matters.
- 16 • Partner with internal and external business partners to review, draft,
17 negotiate and interpret a high-volume of contracts on behalf of
18 MassDOT and the MBTA.
- 19 • Act as a liaison between Office of General Counsel and internal and
20 external business partners as necessary for contract inquiries and
21 guidance.
- 22 • Develop and implement best practice solutions to improve contract
23 management and delivery of related services.
- 24 • Master and seek to continue to improve the internal contracting tools,
25 including the review, updating and development of contract templates.
- 26 • Help develop and implement new policies, procedures and templates
27 and provide education on same to internal business partners.
- 28 • Provide comments and propose drafts of proposed federal and state
29 laws and regulations related to MassDOT and MBTA contracting
30 authority.
- 31 • Handle contract dispute resolutions.
- 32 • Provide analysis, recommendations, and reports to General Counsel.
- 33 • Lead MassDOT's and the MBTA's contract management modernization
34 efforts.³⁶

35 Since 2020, Martin has served as senior or chief legal counsel for the MTBA and/or
36 MassDOT on several large and complex projects. The projects include Parcel 13, which

³⁵ The salary range on the posting was \$110,000-\$130,000 annually. As of 2021, Martin's annual salary was \$135,916.

³⁶ Martin testified that the posting reflected his duties and responsibilities.

1 is a MassDOT air rights project to build a deck over the Massachusetts Turnpike that
2 involves the Hynes MBTA Green Line station and improvements thereto; the development
3 of Widett Circle, a 30-acre parcel of land between South Boston and Lower Roxbury that
4 is bordered on one side by MBTA and Amtrak tracks, with parcels owned by several
5 different entities, including MassDOT, Amtrak, and the City of Boston and private
6 developers; the Pan Am/CSX Railroad merger, involving two private entities that operate
7 trains on MBTA and MassDOT tracks; and renegotiating the Attleboro Line Agreement,
8 involving Amtrak's use of MBTA tracks in the southern part of the state.

9 Martin's duties on the projects include coordinating meetings between MassDOT
10 or the MBTA and local and federal officials, developers and authorities; negotiating and
11 drafting specific and standard contract language to protect the MBTA's and MassDOT's
12 various interests in these projects; obtaining or assisting his clients in obtaining the
13 necessary permits and approvals to go forward; resolving both internal and external
14 disputes between the parties; researching complex contract and insurance issues; and
15 addressing politically sensitive issues. As the Chief Attorney on Parcel 13, Martin also
16 serves in a project manager capacity. At all stages of the project or transaction, Martin
17 provides advice to senior MBTA/MassDOT officials, including MassDOT Undersecretary
18 Scott Bosworth (Bosworth) and MBTA Chief Real Estate Officer Richard Henderson
19 (Henderson) on strategy and policy issues, such as limiting liability, keeping insurance
20 costs down and making risk assessments.³⁷ He also meets with various elected officials

³⁷ On cross-examination, Martin stated that all negotiations have strategic issues with respect to their subject matter.

1 and community members. Martin serves as a top advisor but not the ultimate decision-
2 maker on these matters.

3 He also drafts regulations and works with transportation lawyers in other states on
4 the Transportation Climate Initiative, a regional collaboration between the Northeast
5 states to levy or sell at auction credits to sell fossil fuels. Within the MBTA, Martin
6 provides legal advice to the Southwest Area strategy group, which addresses where to
7 store commuter trains that service the western and southern rail routes before and after
8 rush hour, and to electrify the diesel trains that run south and east of Boston. Martin
9 serves with senior MBTA officials in this group, including the Chief Real Estate Officer,
10 the Chief Innovation Officer, the Office of Chief Engineer, the Chief Environmental Officer,
11 and someone from intergovernmental affairs. His smaller projects include developing a
12 template for the MBTA to provide video monitoring screens that provide bus arrival times
13 at bus stops in various cities and towns. Martin is also responsible for overseeing all
14 contracts involving 10 Park Plaza, the MassDOT building familiarly known as the State
15 Transportation Building. He also reviews procurements sought by the Building Services
16 Division, which is run by Bosworth, to ensure that the MBTA's interests are covered.

17 Three Commercial Transactions COE attorneys assist him with these duties.³⁸
18 Freire reviews procurement and construction contracts; Sharon Shore, (MassDOT Senior
19 Counsel, Procurement) reviews and manages service contracts with the building's
20 security and maintenance department and elevator service group; and Teresa Patten

³⁸ Martin testified that he "manages" these attorneys, but the record contains no further details as to what that entails. There was no evidence that he had hired any counsel or formally evaluated their work.

(MassDOT Senior Counsel, Real Estate) organizes reviews, and summarizes the building's leases and easements. Shore and Freire are members of NAGE's bargaining unit. Patten's position is not included in any bargaining unit.

Hildy Feuerbach – Senior Lead Counsel, Real Estate

As of 2021, there were four attorneys in the Real Estate Practice: Feuerbach; Corey Rhoades (Rhoades), a MassDOT employee whose title is Senior Lead Counsel, Real Estate Development Projects; Patten, Senior Counsel, Real Estate, who is a MassDOT attorney; and Bellino, who is an Assistant General Counsel II in the Steelworkers bargaining unit. On the 2020 organization chart, Bellino and Patten report to Feuerbach, and Rhoades and Feuerbach report to Caldarelli.

Feuerbach's background is in real estate law. By the time she assumed the Senior Lead Counsel position in 2019, she had 30 years of legal experience, including four years working for both MassDOT (2015-2016) and the MBTA (2016-2018). From 2015 onwards, her office was located in the Office of Real Estate and Asset Development (OREAD).

As part of the legal department's reorganization described above, on January 10, 2019, Breen sent a memo to the Human Resources Department announcing Feuerbach's promotion to Senior Lead Counsel, Real Estate. The memo stated in part:

Appointment Justification

This promotion of Hildy Feuerbach to the new position of Senior Lead Counsel-Real Estate for the Office of General Counsel is part of the legal department reorganization that was presented and approved in the Position Control process. The salary for this position is \$125,000, with an effective date of January 1, 2019.

This [position] is responsible for managing the real estate practice within the Commercial Transactions Center of Excellence. In this role, Hildy will have responsibility for all MassDOT/MBTA real estate matters and oversight of

1 all real estate attorneys and will participate in policy-making related to
2 complex real estate projects and transactions.³⁹

3 In 2018, prior to her promotion, Feuerbach's annual salary was \$97,400 and
4 Armstrong, her immediate supervisor, was earning \$140,000. As of 2021, Feuerbach's
5 salary was \$130,688.

6 Since 2019, Feuerbach has served as senior lead counsel on numerous real estate
7 matters, including several very large and complex cases. Her duties from 2019-2021
8 included leading the legal effort on different air rights projects, including projects involving
9 Parcel 7, Parcel 15, and Parcel 12, a \$800 million project. Her duties on these projects
10 included recommending and managing outside counsel and retaining outside consultants
11 to help manage insurance issues and risk assessment; meeting and advising high-
12 ranking MBTA and MassDOT employees including Breen, Bosworth, Henderson, the
13 Chief of Capital Delivery, and the MBTA's Chief Engineer; and leading internal
14 negotiations on such matters as the timing of payments, setting the financial capacity of
15 guarantors, and permitting and licensing compliance.

16 Another high-profile matter that Feuerbach worked on was the decision to close
17 parts of the Massachusetts Turnpike during part of the COVID-19 pandemic. Feuerbach
18 participated with Breen, Bosworth, the District Director, and the Highway Administrator
19 on this matter. Her role included analyzing the impacts of lane closures and how to
20 minimize them. She was a party to discussions in which the MBTA developed its
21 negotiating strategy for this issue.

³⁹ Feuerbach testified that this accurately reflected her responsibilities.

1 On day-to-day matters, Feuerbach reports directly to Caldarelli, who, relying on
2 her legal expertise, gives her a great deal of autonomy to perform the necessary legal
3 work, including assigning and overseeing the work of other attorneys. Feuerbach keeps
4 Caldarelli informed of the projects she is working on and consults with him from time to
5 time. On matters pertaining to air rights, Feuerbach reports directly to Breen.

6 Many matters that Feuerbach works on require higher approval. For example, the
7 lease for Parcel 12 required the Governor's approval. Although Feuerbach and outside
8 counsel prepared updates for the Governor's legal office, it was Breen who discussed
9 those updates with the Governor's office. For other leases drafted by attorneys in the
10 real estate practice area, Feuerbach reviews their work, with further approval needed
11 from Caldarelli and/or Breen. The non-legal signatures may come from the project
12 manager and someone in the OREAD office. The legal signatures generally reflect that
13 the form of the agreement is adequate, that all the legal issues have been addressed,
14 and that the recommendation is appropriate.

15 Feuerbach also works on the MBTA Board of Director's resolutions and drafts
16 votes for the Board's approval. She typically confers with Breen before sharing drafts of
17 Board votes. She creates presentations to the Board and helps prepare the presenter
18 but does not make the presentation. Feuerbach attends Breen's weekly COE meetings.
19 She also occasionally covers for Caldarelli in his absence.

20 Feuerbach was involved in hiring Bellino in 2019. She first participated in
21 determining what the section's needs were, then recommended the creation of the
22 position, helped draft the job description and interview questions, served on the three-

1 person interview panel, and, along with Cobb, recommended to Breen that Bellino be
2 hired. Breen conducted a follow-up interview.

3 In 2020, Feuerbach was also involved in hiring Rhoades, Senior Lead Counsel
4 MassDOT employee, and helped draft his job description. As with Bellino, Feuerbach
5 considered the needs of the department and what role the new attorney would play. As a
6 Senior Lead Attorney, he was brought on at Feuerbach's level and she helped train him.
7 Unlike other Senior Lead Attorneys, however, Rhoades does not supervise anyone.

8 Bellino and Patten serve as junior attorneys on the team. The projects that they
9 work on are generally not as complex and do not require as much interaction with high
10 level officials as the ones Feuerbach works on. Bellino works with outside counsel on a
11 few issues but does not review their bills or scope of work. Feuerbach reviews most but
12 not all their work. There is no evidence that Feuerbach conducts Bellino's or Patten's
13 performance reviews or can discipline them or recommend disciplinary action.

14 When asked to compare her current role to that of her former supervisor Deputy
15 General Counsel Armstrong, Feuerbach answered that Armstrong focused more narrowly
16 on MBTA issues whereas, due in part to her (Feuerbach's) personality and in part to the
17 reorganization, Feuerbach focused on both MassDOT and MBTA issues. Feuerbach also
18 stated that, due to the level of experience she had when she became Senior Counsel,
19 Real Estate, Armstrong granted her broader discretion and gave her higher level
20 assignments than Feuerbach granted to Bellino, at least initially.

1 Daniel Percac – GLX Program Counsel⁴⁰

2 Daniel Percac holds the position of GLX Program Counsel which reports to both
3 Caldarelli and GLX Program Manager John Dalton (Dalton). Dalton reports to the MBTA's
4 General Manager.

5 The Green Line Extension project was an MBTA construction project to extend the
6 northern end of the Green Line into Somerville and Medford. The MBTA posted the GLX
7 Program Counsel position in 2017. The posting states in part:

8 The GLX Program Counsel will provide day-to-day legal and policy advice,
9 review, analysis and confidential counsel for the MBTA's [GLX] Program in
10 support of the GLX Program Manager and GLX Program Management
11 Team. The GLX Program Counsel will work in the GLX Program Office with
12 primary responsibility for GLX legal matters, conferring with General
13 Counsel as needed.

14
15 Duties and Responsibilities include:

- 16 • Manages legal and policy issues pertaining to the GLX Project in
- 17 coordination with the Office of the General Counsel
- 18 • Provides legal advice and assistance to GLX Program manager and
- 19 leadership team.
- 20 • Reviews, negotiates, evaluates, and drafts GLX professional service
- 21 agreements, construction contracts, change orders, amendments, and
- 22 related documents for approval of GLX Program Manager.
- 23 • Manages outside counsel assigned to the GLX Project...
- 24 • Evaluates and provides legal advice and analysis ...monitors status of
- 25 claims and potential legal actions.
- 26 • Ensures compliance with applicable laws, regulations and policies...⁴¹

⁴⁰ The 2020 organization chart refers to Percac's position as GLX *Project* Counsel and that is the title the Union used in its petition. However, the offer letter and job posting refer to the position as GLX *Program* Counsel, and we therefore use that title for purposes of this proceeding. See also footnote 44.

⁴¹ Percac testified that this job description accurately captured his job duties.

1 In October 2017, the MBTA hired Percac as GLX Program Counsel at an annual
2 salary of \$140,000.⁴² The offer letter indicated that the position was “project specific” and
3 was limited to the term of the construction project, which was anticipated to end in
4 December 2021.⁴³ Prior to the onset of the pandemic, in March 2020, Percac worked out
5 of the GLX office in Somerville. The GLX team included non-bargaining unit Deputy
6 Program Managers for design, construction program, project controls, stockholder
7 engagement, and administration.⁴⁴

8 Percac reports to Dalton daily and considered him, and the rest of the GLX team
9 to be his client. Percac meets frequently with Dalton and the Deputy Program Managers
10 and provides them with legal advice and risk assessment on a variety of contract,
11 procurement, and other issues that arise out of the project. At times, bargaining unit
12 members have worked on the GLX project, but there is no evidence as to what they did
13 or if they came into contact with Percac. Union President Condon has never met Percac.

14 Percac reports to Caldarelli less frequently, mainly to apprise Caldarelli of the
15 major issues that he is working on, or to seek Caldarelli’s input on matters that he is not

⁴² The salary range on the posting was \$94,460 - \$125,820. As of 2021, Percac’s annual salary was \$150,762.

⁴³ As of the September 2021 hearing, the GLX project had been extended beyond December 2021. Percac testified that he expected there to be “substantial completion” by May 2022. He also testified that “apparently if there’s work later on.... I can go to another project presumably” but as of the hearing, he had not spoken to anyone about that. Nor was there further testimony on what gave him that impression.

⁴⁴ Percac testified credibly and without rebuttal that his functional title since hire has been Deputy Program Manager, Procurement and Legal, and that various documents refer to him as such. However, no such documents were submitted into evidence. The offer letter indicates that Percac’s title is GLX Program Counsel, and we treat that as his title for purposes of this proceeding.

1 sure of or that might implicate other Commercial Transactions practice areas. Percac is
2 responsible for all GLX services (as opposed to materials) procurement, including
3 extending project insurance and contractor contracts.⁴⁵ He also reviews change orders
4 subject to Dalton's or the General Manager's final approval. His role in managing the
5 scope of work performed by outside consultants depends on whether the consultants'
6 services fall within Percac's purview. For example, the Deputy Manager for Design would
7 manage design contractors, whereas Percac handled contractors who perform real estate
8 or environmental work. Percac also has some responsibilities regarding outside counsel,
9 including working with them to develop positions to present to the General Manager, and
10 reviewing their invoices subject to the General Counsel's final approval.⁴⁶ Percac's other
11 duties include meeting with outside parties, such as developers and appointed and
12 elected officials from the cities of Cambridge, Somerville, and Medford regarding matters
13 like easements. On one occasion, he assisted the MBTA's employment lawyers in
14 handling an allegation that a contractor or subcontractor had harassed an MBTA
15 employee.

16 Ryan Ferch – Senior Counsel, Regulatory Compliance

17 Ryan Ferch holds the position of Senior Counsel, Regulatory Compliance that is
18 within the Corporate and Regulatory COE. The Corporate and Regulatory COE is headed
19 by Managing Counsel Eileen Fenton (Fenton). It has two practice areas, Regulatory

⁴⁵ Percac testified that because he oversees all procurement matters, not just legal issues, not all the advice he provided to the GLX team would necessarily be protected by attorney-client privilege.

⁴⁶ Percac played no role in hiring outside counsel because they were retained before he was hired.

1 Compliance, and Corporate and Ethics, each headed by a Senior Lead Counsel. When
2 fully staffed, there are three attorneys in Regulatory Compliance – a Senior Lead
3 Counsel, a Senior Counsel, and a Counsel. As of September 2021, the Senior Lead
4 Counsel position was vacant. The two remaining attorneys, Senior Counsel Ferch and
5 Counsel Rachel Morse (Morse), reported directly to Fenton. Morse is a member of the
6 Steelworkers bargaining unit.

7 Ferch was originally hired in 2017 as Senior Counsel, Litigation and Compliance,
8 which was classified as an executive position. Ferch was hired to work on major non-tort
9 litigation and to conduct and/or oversee investigations both internally and as a liaison with
10 outside agencies into the MBTA. At the end of 2017, he also began overseeing the
11 employment law group, which consisted of four TEA attorneys. In this capacity, he
12 reported directly to Breen. His salary as of September 2021 was \$118,456.

13 In 2020, Ferch moved into the Regulatory Compliance practice area. His major
14 duties there included litigation, working on internal and external investigations and
15 performing legislative and regulatory research. His litigation duties include responding to
16 and litigating non-party subpoena requests, including grand jury subpoenas. He also
17 responds to requests from the U.S. Attorney's office, the Attorney General's office, and
18 similar requests from other state and federal entities. Ferch also works on civil rights
19 issues such as the MBTA's compliance with the Americans with Disabilities Act.

20 His investigation duties comprise between 30-60% of his workload. The
21 investigations often originate through the State Inspector General's office. He has
22 handled at least one matter where an employee was the target of a grand jury. He has
23 also investigated allegations of employee misconduct on the job, e.g., double-dipping or

1 excessive overtime. His investigation duties may require him to obtain personnel files
2 from Human Resources or labor relations personnel for review before turning them over
3 to an outside agency. Beyond investigations, Ferch works with both state and federal
4 audits of the MBTA and has worked with Fenton and the Chief Counsel of the Registry of
5 Motor Vehicles on drafting regulations.

6 Scott Spencer – Senior Counsel, Tort Litigation

7 Scott Spencer holds the position of Senior Counsel, Tort Litigation that is within
8 the Litigation COE. The Litigation COE is headed by Managing Counsel Kathleen Carey
9 (Carey). It has two practice areas: Litigation and Claims. The Litigation practice area is
10 comprised of Senior Counsel Spencer; four bargaining unit attorneys, Amy Bratskier
11 (Bratskier), Christine Martin (C. Martin), Sonia Skinner (Skinner), and David Walsh
12 (Walsh). The practice has one paralegal.

13 Spencer was hired as Senior Counsel in December 2018. He previously worked
14 for the MBTA as a paralegal from 2008 to early 2011 and then as an attorney (Assistant
15 General Counsel) until 2014.⁴⁷ He was in Local 453's bargaining unit when he was a
16 paralegal, and he was in the Steelworkers' unit when he was an attorney. He left the
17 MBTA for private practice in 2014. Around 2018, while still in private practice, his law firm
18 loaned him to the MBTA to help with tort litigation. In spring 2018, after learning Feltner
19 was retiring, Spencer applied for the job. He was hired at an annual salary of \$120,000.
20 As of September 2021, he was earning \$129,225.

21 Duties and Responsibilities

⁴⁷ The posting for the Assistant General Counsel position that Spencer held in 2011 is described below.

1 The 2018 posting for the position stated in part:

2 Senior Counsel-Tort Litigation provides day-to-day management and
3 supervision of the attorneys in the Tort Claims and Litigation Unit within the
4 Litigation Center of Excellence reporting to the Managing Counsel,
5 Litigation.⁴⁸

6 Spencer spends roughly 50% of his time on his own litigation caseload and the
7 other 50% on supervising and managing. Carey determines what work and whose work
8 Spencer should supervise and then delegates that work to him. Spencer's supervisory
9 duties consist mainly of overseeing and reviewing the newer attorneys' work. Spencer
10 reviews the more experienced attorneys' work to a lesser extent. He occasionally reviews
11 C. Martin's work. Carey does not typically review attorneys' work unless the attorneys
12 are making a request for settlement authority. Carey has settlement authority up to
13 \$100,000. Spencer has no independent settlement authority. Spencer occasionally fills
14 in for Carey. When doing so he has signature authorization that allows him to sign off on
15 settlements that have received prior authorization. Bratskier also fills in for Carey on
16 occasion. Spencer regularly collaborates with Bratskier and rarely reviews her work.
17 Depending on the complexity of the matter, he will sometimes submit his own work to
18 Bratskier for her comment. He does not typically submit his work to Carey for approval
19 but will do so if he wants her input on something that he has not handled before.

20 Spencer has participated in the hiring process for both managers and bargaining
21 unit attorneys. He was on a recruiting team for a new Director of Risk Management, who
22 reports to the Chief Financial Officer. He was also involved in hiring Skinner and Walsh,

⁴⁸ Spencer testified that the summary of his position was "generally" accurate. As summarized above, however, his testimony reflected that the duties and responsibilities listed on the posting were, at best, only partially accurate.

1 who were hired to backfill positions that had been vacated due to retirements.⁴⁹ Along
2 with Cobb and Carey, he updated Skinner's and Walsh's job descriptions, developed
3 interview questions, and attended the interviews and scored responses.⁵⁰ After the
4 interviews were scored, the team recommended the candidate with the highest score to
5 Breen, who conducted a final interview with the candidate.

6 As of the hearing, Spencer carried a workload of about 40 MBTA and MassDOT
7 matters. When Spencer was in the bargaining unit, either Feltner or another bargaining
8 unit attorney assigned work to him, and 100% of his workload was MBTA tort litigation.

9 Spencer works with outside counsel on some of these matters. He helps them
10 prepare a litigation plan and a budget, which Carey must then approve. He reviews their
11 invoices but does not sign off on their task orders. Spencer also monitors their work,
12 including discovery and motion practice. Spencer also works with outside counsel to
13 provide Managing Counsel with an estimate of what the overall exposure of the case is,
14 i.e., what authority they may need to resolve the case. Spencer worked with Carey on in-
15 house and outside counsel guidelines for handling litigation cases, which addressed
16 matters such as the timelines the attorneys needed to follow and the reports they needed
17 to file at various stages of litigation. Spencer wrote the first draft, which Carey reviewed.

⁴⁹ Skinner was hired to backfill Paul Sahovey's position after he retired. We note that Paul Sahovey is mentioned in the 1995 decision as the bargaining unit member to whom Feltner delegated the task of assigning cases to other attorneys. 22 MLC at 1132.

⁵⁰ Even though Walsh was hired to backfill a vacancy, Walsh's hiring involved the additional step of going through a position control board consisting of high-level MBTA executives who had to approve the position before it was posted and filled. Spencer worked with Cobb to develop their "pitch" before the board. He also presented the pitch on behalf of the General Counsel's office. The final decision as to whether to post or fill the position rested with the position control board, not Spencer, Cobb, or Carey.

1 The guidelines then went through a series of edits, before being distributed to outside and
2 in-house counsel.

3 Spencer, like other law department attorneys, prepares reports on case status,
4 exposures, and dispositions for the Managing Counsel. He does this for his own cases
5 as well as those that outside counsel are working on. At a higher level, Spencer keeps
6 track of all matters in the legal case management system. He makes sure that the data
7 is up to date and produces reports for the General Counsel, CFO and/or budget office.

8 Spencer is also involved in risk management. He works with the Acting Director
9 of Risk Management to develop pitches that explain the MBTA's system and the history
10 of claims for potential insurance underwriters in the London and Bermuda markets. As
11 of the hearing, Spencer expected to participate in a new agency-wide risk counsel
12 committee comprised of designees from various MBTA departments, including the
13 General Manager, Deputy General Manager, the Chief Operating Officer, the Chief
14 Financial Officer, the Chief Safety Officer, the Chief Security Officer and representatives
15 from the subway and bus departments. He also provides data from the risk management
16 system and other relevant information to the persons involved in obtaining property
17 insurance for the MBTA.

18 He has worked with the Attorney General's Office (AGO) on two occasions – one
19 pertaining to Parcel 12, where the MBTA is the client and with the AGO serving as
20 counsel, and another involving litigation contesting MassDOT's decision to close an at-
21 grade crossing.

22 Bargaining Unit Attorneys – Duties and Responsibilities

1 In 2011, the MBTA posted an opening for a bargaining unit Assistant General
2 Counsel. The posting described the duties of the position as follows:

3 The Assistant General Counsel will represent the Authority before the
4 Commonwealth's District and Superior Courts, handling personal injury and
5 other matters involving primarily public transportation issues and the
6 application of M.G.L. c. 258 to the MBTA. The Assistant General Counsel
7 may also assist with employment-related cases and represent the Authority
8 before the Massachusetts Commission against Discrimination (MCAD) as
9 needed. The selected candidate will: provide legal analysis and advice to
10 the Authority as requested by the General Counsel; assist in conducting
11 litigation in courts and before administrative bodies on behalf of the
12 Authority; develop and promulgate rules, regulations and policies; and
13 determine the applicability of federal state and local laws and regulations.
14 Further, the Assistant General Counsel will: conduct discovery, including
15 taking and defending depositions and drafting interrogatories, requests for
16 production of documents, and responses to same; prepare position
17 statements, certification memoranda, memoranda of fact and law, and
18 various motions and oppositions thereto;...

19
20 This position was originally posted as an executive position, but was
21 changed to a bargaining unit position at a higher salary after the Union
22 successfully persuaded the Director of Human Resources at the time that it should
23 be a bargaining unit position.⁵¹ A 2015 job posting for an Assistant General
24 Counsel V Steelworkers position contains essentially the same job duties and
25 responsibilities, including developing and promulgating rules, regulations and
26 policies, and assisting with employment-related cases.

27 In 2013, the MBTA posted a vacancy for an Assistant General Counsel II
28 position in Design and Construction, a position held by bargaining unit member

⁵¹ The change in the bargaining unit status of the position is reflected in the posting's heading, which states, "PREVIOUS APPLICANTS NEED NOT REAPPLY. PLEASE NOTE CHANGE IN UNION AFFILIATION."(All caps in original)

Ann DePierro (DePierro). The posting's job summary stated that this employee would:

[P]rovide public construction contract law advice to Design and Construction and coordinate efforts related to Design and Construction activities with the following departments: Contract administration, real estate, design, construction, environmental, legal, and the project offices.

Specific duties include:

- Draft, review and negotiate professional services and construction contracts;
- Review claim packages submitted by designers and construction contractors;
- Review contract documents in accordance with federal, state and legislative guidelines;
- Assist in the development, maintenance, and implementation of the Authority's procurement processes, policies, and procedures, including drafting and developing contracts, RFQ/Ps, procurement forms, contract disputes, and document retention;
- Negotiate, draft and review complex agreements to secure the necessary consultant/contractor relationships for current and future MBTA needs with prime/sub consultants(s) and contractors(s).
- Perform legal research as required on issues related to contract transactions, including but not limited to limitation of liability, risk, management, intellectual property, corporate transactions, and technology licensing.
- Stay abreast of federal and state developments which can impact MBTA objectives, policy and standard operating practices.

A 2014 posting for an Assistant General Counsel V bargaining unit position

included the following duties and responsibilities:

- Provide legal analysis and advice as requested by the General Counsel, on a variety of issues including but not limited to business law issues relating to the Materials Department, Operations, Transit Police Department, Information Technology Directorate, Engineering & Maintenance and the Treasurer/Controller's Department.
- Provide legal support for large dollar value procurements; negotiate interagency agreements with local, state and Federal entities; represent and advise the contracting officer on bid disputes/protests; and advise on intellectual property and bankruptcy issues.
- Conduct litigation in courts and before administrative bodies...
- Develop and promulgate rules, regulations and policies.

1
2 Rachel Morse, Assistant General Counsel V
3

4 Morse works with Ferch in the Regulatory Compliance practice area. They
5 both report to Fenton. As of 2019, her annual salary was \$117,606.

6 Morse started working with the Authority in 2015, reporting to a Deputy
7 General Counsel. After that individual left, Morse worked without a supervisor for
8 a while.⁵² During that period, she had no formal assignments, but she advised
9 internal clients, such as the marketing department and the MBTA safety
10 department, on matters like advertising on the T and compliance issues with the
11 State Safety Department. As of the hearing, she was working with Ferch on
12 reviewing and/or updating MassDOT and MBTA regulations and policies, including
13 the MBTA's advertising, social media, and privacy policies.

14 Morse has worked with outside counsel on a few matters. Before the
15 hearing, she assisted another bargaining unit attorney in compiling a list of outside
16 law firms that were working on MBTA matters and the potential exposure of each
17 matter they were working on. On at least two occasions, she has recommended
18 retaining outside counsel for a particular project. Both recommendations were
19 accepted by the General Counsel.

20 Christine Martin, Assistant General Counsel V, Tort Litigation

⁵² Morse testified that the 2018 organization chart was wrong to the extent it has her reporting directly to Breen. On a few research projects, she worked directly with former General Counsel Englander, but she never formally reported directly to either Englander or Breen.

1 As described above, C. Martin works with Spencer and Bratskier in the
2 Litigation practice area. She was hired in 2015. As of 2019, her annual salary was
3 \$117,616.

4 C. Martin maintains a caseload of about 60-75 cases, consisting mostly of
5 tort litigation, insurance and subrogation claims. Carey assigns cases to her
6 electronically. C. Martin is responsible for the case from the time it is assigned until
7 final disposition, whether by settlement, arbitration, or trial. Like Spencer, any
8 settlement she negotiates must be approved by Carey or Breen.

9 Her duties with respect to outside counsel are similar to Spencer's. She
10 works directly with them and has responsibility for overseeing and reviewing their
11 pleadings, motion practice, etc. In cases where an MBTA contractor is involved,
12 e.g., a cleaning contractor, she will try to tender the case to the contractor, and if
13 the tender is accepted, she, with Carey's approval, will select outside counsel to
14 represent both the MBTA and the contractor.

15 C. Martin has also received assignments directly from the General
16 Counsel's office, including research assignments from former General Counsel
17 Englander and assignments from Breen regarding selecting a new legal case
18 management system. C. Martin, along with others, attended various companies'
19 presentations and reported back to Breen. Around 2016-2017, C. Martin worked
20 directly with the CFO on restructuring healthcare management funds. She also
21 worked on procurement matters for a while, assisting with RFPs. Before the new
22 legal case management system became operative, C. Martin, and other bargaining
23 unit lawyers met with AON, the MBTA's former outside consultant, to set the

1 reserves on cases. She also worked with Morse on the inter-departmental audit
2 and with department heads to compile a list of cases with high potential exposure.

3 James Condon, Assistant General Counsel IV, Claims Section

4 As of September 2021, Condon had worked at the MBTA for over 30 years.
5 and served as Union president since 2001. As of 2019, his annual salary was
6 \$117,616. As the Claims practice area is a subdivision of the Litigation COE,
7 Condon reports directly to Carey. He supervises three employees: one
8 Steelworker, Claims Administrator Tony Perez (Perez), and two Claims Assistants
9 who are in Local 453. These employees assist Condon in handling all the bodily
10 injury and property damage claims filed with the MBTA. Condon's duties include
11 investigating and adjusting those claims and litigating related cases. Some of the
12 more serious claims are referred to outside counsel. Condon discusses those
13 matters with outside counsel but is not responsible for deciding whether a claim
14 should be referred to them. That decision rests with Carey and the General
15 Counsel. Condon was involved in hiring the three individuals currently in his
16 department. He has also provided training to Green Line employees regarding
17 safe driving, negligence, and the duty of care. Condon also served on a risk
18 management safety committee in the mid-1990's.

19 Julie Ciollo, Assistant General Counsel V, Counsel, Records Access
20 Officer, MBTA.

21
22 Ciollo works within the Corporate and Regulatory COE in the Corporate and Ethics
23 practice area. On the 2020 organization chart, there were six attorneys in that area:
24 Senior Lead Counsel Amy Nash (MassDOT); Deputy General Counsel and Ethics Officer
25 Jean Berke; Senior Counsel Stephen Shorey (Shorey); and two "Counsel," including

1 Ciollo. As of 2019, Ciollo's annual salary was \$117,616.00. Ciollo works closely with
2 Shorey, who is a MassDOT employee.

3 Ciollo processes all public information requests that are made to the MBTA. The
4 requests are made via email or through an electronic portal. Once Ciollo receives a
5 request, she first determines which department is the custodian of the requested records
6 and then analyzes whether any of the requested information is exempt from disclosure
7 under the public records law. If exempt, Ciollo prepares a response that explains why
8 the MBTA is withholding the records. For roughly 10-20% of the requests, Ciollo consults
9 with Shorey or Managing Counsel Fenton or seeks their review of draft responses she
10 prepares. Fenton may then seek additional guidance from the General Counsel.

11 Non-attorney Bargaining Unit Members

12 Claims Administrator Antonio Perez.

13 Perez works in the Claims practice area handling pre-litigation claims. He reports
14 to Condon. Perez has worked at the MBTA for over 30 years. Since 1990, his duties
15 have included researching various software systems for the MBTA. In 2018, he worked
16 with Risk Manager Mark DeCourcy (DeCourcy), Condon, and two Claims assistants to
17 research a replacement for a 20-year-old software system.

18 Perez also works with DeCourcy to extract data and prepare reports that the Risk
19 Management department can use to identify problem areas, get better prices on
20 insurance, and improve claims handling generally. For example, after Perez prepared a
21 report showing what pedestrian injuries and bus accidents cost, the MBTA approved the
22 purchase of a bus driver simulation program. Like other bargaining unit members, Perez
23 has generated reports for the annual AON audit.

1 John McCormack, Senior Project Manager, Capital Delivery

2 John McCormack (McCormack) has worked for the MBTA since 2005. He began
3 as a Resident Engineer in the Design and Construction Department, where he was a
4 member of Local 453's bargaining unit.⁵³ Around 2011, he was promoted to Project
5 Manager, Construction, a Steelworkers' bargaining unit position. In 2016, he was
6 promoted to Senior Project Manager, Capital Delivery, another bargaining unit position.

7 A 2019 posting for the position listed the annual salary range as \$90,892 -
8 \$117,280. The position summary on the posting stated:

9 The Senior Project Manager will manage the development of complex
10 MBTA Capital Delivery projects from project inception (planning) through
11 the design phase (conceptual, preliminary and final) and the construction
12 phase (including project close-out) with full responsibility for quality and
13 control of schedule and budget.

14 The posting included the following duties and responsibilities:

- 16 • Manage multiple consultant and construction contracts to ensure project and
17 program requirements are fulfilled and contract cost and schedule requirements
18 are met.
- 19 • Manage assigned Capital Delivery projects in accordance with the following MBTA
20 Manuals, policies and procedures as may be amended from time to time, or
21 program-specific delivery protocols and procedures if supporting a major MBTA
22 program.
- 23 • Assist in the development of Capital Delivery project scopes, budgets and
24 schedules as part of the capital planning process.
- 25 • Assist in the procurement of consultants and contractors, as required.
- 26 • Negotiate project assignments, task orders, amendments, change orders, and use
27 of contingency, and make recommendations for approval.
- 28 • Review and analyze monthly payment and schedule submissions from consultants
29 and contractors.
- 30 • Coordinate and participate in Project Design Group meetings, value engineering
31 sessions, constructability reviews and risk workshops, as required.
- 32 • Coordinate project tasks with other Capital Delivery Department personnel,
33 including contract administration, field staff, and other project coordinators, as
34 required.

⁵³ McCormack testified that Design and Construction department changed its name to Capital Delivery after the winter of 2015.

- 1 • Coordinate project tasks with other Departments, including the Capital Program
- 2 Oversight Department (project controls and administration and finance),
- 3 Engineering and Maintenance, and Railroad Operations, as required.
- 4 • Coordinate project activities with outside agencies, abutters, utility companies,
- 5 community groups and other third parties affected by the project as required.
- 6 • Ensure that all work has been completed, and necessary approvals have been
- 7 obtained prior to advertising projects for construction, including budget approval,
- 8 environmental permits and approvals, real estate actions and approvals, and force
- 9 accounts...
- 10 • Manage the construction project process from advertisement to contract closeout
- 11 to ensure the project is completed on time and within budget.
- 12 • Resolve any conflicts that may occur throughout the life of the project.
- 13 * * *
- 14 • Analyze all contract proposals or bids and provide recommendations for senior
- 15 management approval.
- 16 • Supervise professional staff including Resident Engineers, Construction
- 17 Inspectors and other administrative personnel as assigned.
- 18 * * *
- 19 • Prepare for and make project presentations to elected officials, community groups
- 20 and others, as required.⁵⁴

21 McCormack reports directly to Lisa Lepore (Lepore), who is a non-union Senior

22 Director in Capital Delivery. McCormack's specific duties have included appearing before

23 the FMCB on multiple occasions to seek their approval to enter into contracts he was

24 managing that were worth millions of dollars.⁵⁵ He has been the main speaker at public

25 meetings aimed at introducing projects to local officials and constituents.⁵⁶ Once a project

⁵⁴ McCormack testified that the posting contained a "fair description" of his duties as a senior project manager.

⁵⁵ FMCB approval was required for professional service contracts of over \$5 million and construction contracts of over \$15 million. The Senior Project Manager, Capital Programs had authority to approve construction contract change orders of up to \$175,000, task orders of up to \$75,000, and amendments to professional service contracts of up to \$50,000.

⁵⁶ When he served as the Senior Project Manager on the rebuilding of the Red Line Wollaston station, he escorted the Governor and the Secretary of Transportation at the station's reopening ceremony.

1 is underway, McCormack continues to manage all of its contracts and ensures that
2 timelines, safety, quality, and budget metrics are met.

3 McCormack has participated in hiring resident engineers. He has also conducted
4 one workplace investigation involving a shoving match between two MBTA employees.
5 Pursuant to the Workplace Violence policy, McCormack notified his supervisors about the
6 incident, gathered witness statements, and contacted transit police. One employee
7 received a three-day suspension as a result of the investigation.⁵⁷

8 McCormack's signature is required on all change order forms for projects he
9 oversees. If the change order is \$175,000 or less, no other signature is required. For
10 higher amounts, he signs after the contractor, but before Lepore. As indicated above, for
11 matters costing more than \$500,000, LeBoeuf signs off as to form only.

12 William Hogan – Supervisor, Operations Control Center (OCC)

13 Hogan has held this bargaining unit position since 2005. A 2021 posting for the
14 position contained the following summary:

15 The supervisor of the OCC provides day-to-day supervision and monitors
16 all bus, [Rapid Transit Line], and [Light Rail dispatchers], OCC Information
17 Officers, Towerpersons, Hub Station Access Clerks and the transportation
18 operation during revenue and non-revenue hours as well as all information
19 provided to the riding public in order to ensure safe and reliable
20 transportation operations.⁵⁸

21 Hogan's responsibilities include recruiting and training dispatchers, and assuming
22 the duties of the Deputy Division Chief of the OCC on weekends, vacations, and as

⁵⁷ There is no evidence that McCormack either recommended or imposed the discipline.

⁵⁸ Hogan testified that this was an accurate description of his duties.

1 needed. As of the hearing, Hogan had been serving as the non-bargaining unit Acting
2 Deputy Division Chief for approximately six months.

3 Hogan has also drafted numerous Standard Operating Procedures (SOP) for the
4 various train lines, such as an SOP for unloading trains when fire or smoke is reported.
5 The head of the safety department must approve his drafts.

6 **Opinion**⁵⁹

7 A unit clarification petition is the appropriate procedural vehicle to determine
8 whether newly created positions should be included in a particular bargaining unit. Town
9 of Athol, 32 MLC 50, 52, CAS-04-3567 (June 29, 2005). In analyzing whether an
10 employee should be accreted into an existing bargaining unit, the CERB considers: 1)
11 whether the position at issue was covered by the original certification or recognition; 2)
12 whether the parties' subsequent conduct, including bargaining history, discloses that the
13 parties considered the position to be included in the existing bargaining unit; and 3)
14 whether the position shares a community of interest with other positions in the existing
15 bargaining unit. If the CERB determines that the requisite community of interest exists, it
16 will accrete the petitioned-for employee into the bargaining unit. City of Boston, 35 MLC
17 137, 140, CAS-07-3669 (December 31, 2008). In this case, because none of the six
18 positions existed in 2000 when the MBTA voluntarily recognized the Union, the first prong
19 of the test is not dispositive, and thus we move to the second prong.

20 Under the second prong, the CERB examines whether the parties' subsequent
21 conduct, including bargaining history, reflects how the parties treated the disputed titles
22 in their dealings with each other and in their collective bargaining. Boston Public Health

⁵⁹ The CERB's jurisdiction is not contested.

1 Commission, 39 MLC 218, 230, CAS-11-1091, CAS-11-1092 (February 28, 2013). The
2 CERB will not accrete a position into an existing bargaining unit if the parties have
3 executed a collective bargaining agreement demonstrating an intent to exclude the
4 petitioned-for positions, unless the job duties of the positions have changed materially.
5 Commonwealth of Massachusetts, 30 MLC 156, 157, CAS-03-3539, 3550 (May 27,
6 2004).

7 The MBTA contends that the second prong is dispositive with respect to Ferch's,
8 Percac's, and Feuerbach's positions. Its argument with respect to Ferch and Percac
9 centers on the Union's conduct during successor negotiations, when the Union
10 specifically sought to represent Spencer's Senior Counsel, Tort Litigation position before
11 making its final offer but did not make a similar request for either Ferch's or Percac's
12 positions. The MBTA argues that the Union's inaction demonstrates that the Union
13 considered and accepted that Ferch's and Percac's position were outside of the unit,
14 thereby precluding the Union, under the second prong of the accretion analysis, from
15 seeking to represent them now. We reject this argument for several reasons.

16 First, to the extent the MBTA is arguing that the instant petition is somehow
17 untimely because the Union did not file it during contract negotiations, we note that issues
18 relating to the scope or composition of a bargaining unit are permissive subjects of
19 bargaining. Somerville Fire Fighters Association, Local 1240, 27 MLC 45, 46, MUPL-4172
20 (November 16, 2000) (citing Boston Police Patrolmen's Association, 8 MLC 1993, 2000-
21 2001, MUPL-2049, MUPL-2052 (February 23, 1982, March 23, 1982), *aff'd sub nom.*
22 Boston Police Patrolmen's Association, Inc. v. Labor Relations Commission, 16 Mass.
23 App. Ct. 953 (1983)). Accordingly, and in contrast to the six-month period of limitations

1 for filing unfair labor practice charges set forth in 456 CMR 15.04, which commences
2 when the charging party knew or should have known of the alleged violation, see, e.g.,
3 Miller v. Labor Relations Commission, 33 Mass. App. Ct. 404, 408 (1992), the timeliness
4 of a unit clarification petition does not turn on whether the petitioner know or should have
5 known of the existence of the disputed positions during contract negotiations. Instead,
6 timeliness is governed by the contract bar rule set forth in 456 CMR 2.04(2), which sets
7 forth when a unit clarification petition that is filed during the term of a CBA will be deemed
8 timely – either between 90 and 60 days before the CBA's expiration date, or at other
9 times during the life of the contract if the petition concerns positions that were created or
10 substantially changed *after* the CBA's effective date. We have previously ruled that the
11 instant petition was not contract-barred.⁶⁰ Accordingly, the Union was not barred from
12 seeking to accrete Ferch's and Percac's petitions by not seeking to accrete them during
13 successor negotiations.

14 The question then becomes whether the parties' conduct demonstrates that they
15 considered Ferch's and Percac's positions to be outside the unit. We hold that it does
16 not. Under the second prong of the accretion analysis, "[a]bsent bargaining history to
17 support a finding that the parties addressed and resolved the unit placement of the

⁶⁰ In a motion to dismiss filed on September 7, 2021, the MBTA argued that the petition was contract-barred because it was filed in 2020, during the stated term of the 2018-2021 CBA. On October 12, 2021, the CERB denied the motion. Noting that one purpose of the contract bar doctrine was to promote stable labor relations by ensuring that parties knew the scope of the unit during the term of a contract, the CERB held that because the Union filed the petition before an arbitrator issued the award establishing the successor agreement, the petition put the MBTA on notice of the potential expansion of the unit before the new agreement went into effect. We note that while the CERB's October 12, 2021 ruling on the motion to dismiss cites 456 CMR 14.06(2), instead of the correct contract bar rule that applies to accretion petitions under Chapter 150A, 456 CMR 2.04(2), the outcome is the same.

1 contested position, the [CERB] will find that it is unable to determine whether the parties
2 explicitly agreed to exclude the contested positions from the bargaining unit.” Town of
3 Somerset, 25 MLC 98, 100, CAS-3145 (January 6, 1999). Here, assuming without
4 deciding that the Union was aware of Ferch’s and Percac’s positions during successor
5 negotiations, there is no dispute that the parties never negotiated over them, and the
6 CBA, including the CBA’s recognition clause and the exhibit to the 2000 decision that it
7 references, are silent as to both positions. Under these circumstances, the second prong
8 of the accretion analysis is inconclusive for Ferch’s and Percac’s positions. Compare City
9 of Chelsea, 36 MLC 111, CAS-07-3671 (January 8, 2010) (rejecting employer’s claim that
10 union’s failure to register any complaint over assignment of unit work to non-unit
11 employees amounted to an explicit agreement to exclude the position performing that
12 work) with Plymouth County Sheriff’s Department, 40 MLC 238, 242, CAS-11-1442
13 (February 21, 2014) (dismissing a petition seeking to accrete Immigration and Custom
14 Enforcement (ICE) service transportation officers to an existing correction officers unit
15 based on a CBA provision that expressly permitted the employer to assign certain duties
16 to persons outside of the bargaining unit, including the ICE transportation officers at
17 issue).

18 As to Feuerbach’s Senior Lead Counsel, Real Estate position, the MBTA contends
19 that the second prong is conclusive based on the agreement the parties reached when
20 the Union withdrew its petition for the Senior Real Estate Counsel position in CAS-18-
21 6625. The MBTA contends that as part of this agreement, the parties agreed to exclude
22 the Senior *Lead* Counsel, Real Estate position from the bargaining unit, thereby barring
23 the Union from pursuing the position at a later date. We disagree for several reasons.

1 First, we disagree that the series of emails that the parties exchanged in January
2 2019 regarding CAS-18-6625 constitutes an agreement to exclude the Senior Lead
3 Counsel, Real Estate position from the unit. Rather, read together, the emails set forth
4 the conditions under which the Union would withdraw its petition for the Senior Real
5 Estate Counsel position. Those conditions included the MBTA's agreement to: a)
6 promote Feuerbach to Senior Lead Counsel, Real Estate; b) eliminate the Senior Real
7 Estate Counsel position; and c) create a new bargaining unit counsel position that
8 Feuerbach would oversee in her new role. In its correspondence, the Union made clear
9 that those changes provided "an adequate basis" to dismiss the petition, but unless those
10 changes happened "within a reasonable time," it reserved its right to accrete "Ms.
11 Feuerbach's position." Because Feuerbach was serving as Senior Real Estate Counsel
12 at the time, it is evident that the Union remained focused on accreting that position, in the
13 event the MBTA did not fulfill its promises. Although promoting Feuerbach to the Senior
14 Lead Counsel, Real Estate position was one of the conditions for withdrawal, the emails
15 contain no express promise from the Union to exclude this position or not to seek it at a
16 future date.

17 In this regard, the facts of this case are distinguishable from those in Board of
18 Higher Education, 45 MLC 195, CAS-17-6266 (June 27, 2019), which, like this case,
19 involved two separate but related CAS petitions. In the first petition, the union sought to
20 accrete 88 positions, including an executive assistant position. The parties settled that
21 petition by the employer agreeing to accrete 24 positions. In return, the union agreed to
22 both withdraw the petition with prejudice *and* not to contest the representation status of
23 the remaining (non-accreted) positions, including the executive assistant position. A few

1 years later, the union filed a second petition, CAS-17-6266, that sought, among other
2 things, to accrete the same executive assistant position. Based on the earlier agreement
3 not to contest the representation status of that position, and absent evidence that it had
4 changed since the union settled the first CAS petition, the CERB found the second prong
5 of the accretion test conclusive as to the executive assistant position.

6 Here, by contrast, although the Union agreed to withdraw CAS-18-6625 with
7 prejudice, the representation status of the Senior Lead Counsel, Real Estate position was
8 not at issue in that matter, and the Union never agreed not to contest its bargaining unit
9 status. We therefore find that the parties did not enter into an agreement to exclude this
10 position from the unit. Its unit placement therefore cannot be resolved at the second
11 prong of the accretion analysis.

12 Even if we were to construe the January 2019 emails between Nash and Portnoy
13 as an agreement to exclude the Senior Lead Counsel, Real Estate position from the
14 bargaining unit, at the time the Union agreed to withdraw CAS-18-6625, it assumed that
15 Feuerbach, as the new head of the Real Estate practice area, would, like Armstrong,
16 report directly to the General Counsel and thus remain outside of the bargaining unit. The
17 MBTA claims this assumption was unreasonable because it was not based on anything
18 that anyone from the MBTA had ever communicated to the Union. While it is true that the
19 MBTA never told the Union that Feuerbach would be reporting to the General Counsel,
20 the MBTA also never told the Union that it was reorganizing the Legal Department to
21 include an additional layer of "Managing Counsel" between staff attorneys and the
22 General Counsel. In the absence of this information, it was reasonable for the Union to
23 assume that Feuerbach, like Armstrong, would report to Breen and remain outside of the

1 bargaining unit. Although the MBTA suggests that the Union should have known about
2 the change in reporting structure from other Senior Lead Counsel postings, the
3 stipulations reflect that the MBTA did not post any Senior Lead Counsel positions until
4 April 2019, which was three months *after* the Union withdrew CAS-18-6625. Upon
5 receiving the 2020 organization chart showing this not to be the case, the Union
6 appropriately and timely filed the instant CAS petition. Cf. Boston Public Health
7 Commission, 39 MLC 218, 230, CAS-11-1091, CAS-11-1092 (February 28, 2013)
8 (changed circumstances may warrant accretion of previously excluded positions). For this
9 reason as well, the second prong of the accretion analysis is inconclusive as to the Senior
10 Lead Counsel, Real Estate position.

11 We now turn to whether that position and the five others should be included or
12 excluded from the bargaining unit as executive and/or confidential employees.

13 Criteria for Executive and Confidential MBTA Employees

14 The MBTA contends that all six positions are executive and/or confidential
15 employees that should be excluded from the bargaining unit pursuant to M.G.L. c. 161A,
16 §26. As discussed above, in the 2000 MBTA decision, the parties stipulated to the duties
17 and responsibilities that executive and confidential employees routinely and typically
18 perform and excluded positions from their proposed bargaining unit on that basis. Since
19 then, the recognition clause of the parties' CBA has required the parties to use these
20 criteria as the basis for determining future unit inclusions and exclusions.

1 We have reviewed the stipulations afresh and agree that they do not conflict with
2 existing CERB policy.⁶¹ Accordingly, although we have found that the parties have not
3 agreed to include or exclude the specific titles at issue here, when determining the unit
4 status of these titles, we will give effect to the parties' continued agreement to utilize the
5 criteria set forth in the 2000 decision as the basis for our determination. See generally,
6 Massachusetts Port Authority, 5 MLC 1844, 1851, CAS-2184, UP-2357 (April 17, 1979)
7 (general purpose of accretion test is to ascertain and give effect to the mutual intent of
8 the parties).

9 Executive Status, Generally

10 The MBTA contends that all the disputed titles except Ferch⁶² should be excluded
11 because they are executive employees who perform one or more of the following
12 responsibilities set forth in the 2000 decision:

- 13 • Development and implementation of MBTA policies;
- 14 • Control of the operations and performance of MBTA department or subdivision;
- 15 • Development and implementation of management rights initiatives and policies
16 pursuant to M.G.L. c. 161A, Section 25;
- 17 • Preparation of proposals and participating in collective bargaining;
- 18 • Administration and interpretation of collective bargaining agreements;
- 19 • Authority to decide and adjust employee grievances;
- 20 • Analysis, recommendations and decisions affecting staffing levels,
21 subcontracting, outsourcing and purchasing; and
- 22 • Effective recommendations regarding hiring, layoff, discipline and discharge of
23 unionized employees.

⁶¹ One exception is the criteria that would blanketly exclude as confidential those employees who represent the Authority in employment law matters. The record includes two bargaining unit job postings whose duties include assisting with employment-related cases and representing the Authority before the MCAD. The employment law exclusion therefore appears to be outdated, and we do not rely on it.

⁶² As discussed below, the MBTA contends that Ferch is a confidential employee.

1 In the instant case, there is no evidence, and the MBTA does not argue that any
2 of the disputed positions are involved in collective bargaining or have the authority to
3 decide and adjust employee grievances. Further, while many of the disputed titles may
4 advise senior MBTA and MassDOT officials on policy, the record supports that none of
5 them have the independent authority to create MBTA policy. Finally, although some of
6 the employees perform supervisory functions like hiring and assigning work, it is well-
7 established that “the mere presence of supervisory indicia like the authority to hire, fire,
8 transfer, suspend, evaluate and promote employees or to adjust their grievances, without
9 more, does not equate to the meaning of the word “executives.” MBTA, 22 MLC at 1139
10 (citing Board of Trustees, University of Massachusetts, 3 MLC 1179, 1204, SCR-2079
11 (October 15, 1976)). Accordingly, when determining whether the disputed positions
12 should be excluded from the unit, we will not rely solely on supervisory duties or any of
13 the other individual elements of the executive analysis; instead, we will view the elements
14 as a whole.⁶³

15 Confidential Status, Generally

16 The MBTA contends that all the disputed titles except Percac and Spencer should
17 be excluded on the grounds that they are confidential employees. In the 2000 MBTA
18 decision, the parties stipulated that confidential employees’ responsibilities “routinely

⁶³ The Union argues that because the list of responsibilities set forth in the 2000 decision’s stipulations are connected by the conjunctive “and,” and not the disjunctive “or,” the listed criteria should be viewed as a cluster of interrelated responsibilities, not an either/or list. We agree, with the caveat that an employee does not need to satisfy every one of the elements of the 2000 stipulations to be considered an executive. We also note that the CERB retains the ultimate authority to determine executive status within the meaning of M.G.L. c. 161A, Section 26.

involved matters that would place or appear to place such employees in a position of a real or apparent conflict of interest,” including by way of example and not limitation:

- Participation in collective bargaining;
- Legal representation in labor and employment matters;
- Certain aspects of personnel administration; public relations; lobbying; access to and processing of confidential information regarding drug testing, criminal records and medical examinations;
- Internal investigation of employees for security, auditing or organizational diversity purposes; and
- directly assisting other executive or confidential employees in a confidential capacity.

The Union argues that because M.G.L. c. 161A, §26 describes confidential employees as those “representing the authority and dealing with employee organizations,” the confidential exclusion should be drawn more narrowly. Relying on Massachusetts Bay Transportation Authority, 6 MLC 1419, CR-3532, et. seq. (August 31, 1979), the Union argues more generally that the CERB should take into account the definitions of managerial and confidential employees specified in c. 150E to assist it in determining the appropriate unit structure.

We address both points. In the 1995 MBTA decision, the LRC opined that the case law developed under Chapter 150E regarding the managerial exemption did “not offer much guidance here because of the significant differences in the language of G.L. c. 150E and G.L. c. 150A.” 22 MLC at 1139, n. 43. In the 1979 MBTA decision, however, the LRC stressed that because the MBTA was a public agency with public employees, the LRC’s general policies for unit determinations arising under Chapter 150A would be based on the factors set forth in Jordan Marsh Co. v. Labor Relations Commission, 316 Mass. 748, 751 (1944), “as elucidated by the parallel provisions of Chapter 150E.” 6 MLC

1 at 1437. We therefore find it appropriate to seek guidance from Chapter 150E when
2 deciding some of the issues presented by this case.

3 In that regard, it is well-established that a primary goal of unit determination is to
4 ensure stable and continuing labor relations by avoiding inherent conflicts within the unit
5 that could result in divided loyalties. See, e.g., Commonwealth of Massachusetts, Chief
6 Administrative Justice, 5 MLC 1699, 1707, SCR-2121 (March 9, 1979) (excluding public
7 defenders from a unit of court employees where performing their respective duties would
8 conflict with their loyalties to other bargaining unit members); City of Boston, 2 MLC 1353,
9 CAS-2009 (February 9, 1976) (excluding employees whose primary function was to
10 investigate allegations of police misconduct from a unit of police patrol officers); Town of
11 Wellesley, 1 MLC 1389, MUP-2009, CAS-2005 (August 25, 1975) (adopting Supreme
12 Court's conclusion in Bell Aerospace that any employee whose duties make the exercise
13 of bargaining rights inconsistent with their duties as an employees must be excluded from
14 any bargaining unit), *aff'd sub nom.* School Committee of Wellesley v. Labor Relations
15 Commission, 376 Mass. 112 (1978).

16 Here, the parties' recognition clause reflects their continued agreement to exclude
17 as confidential those employees whose responsibilities involve matters that could place
18 or appear to place employees in a conflict-of-interest situation. Therefore, even if the
19 criteria that the parties have historically applied in determining the confidentiality
20 exclusion is broader than that set forth in Chapter 161A, giving effect to the parties'
21 agreement to exclude employees whose regular performance of those duties creates a
22 real or apparent conflict of interest *within the bargaining unit* does not run counter to

1 established CERB policy or practice, whether arising under Chapter 150A, Chapter 161A,
2 or Chapter 150E.

3 Roger LeBoeuf - Senior Lead Counsel, Capital Delivery
4

5 The MBTA contends that this position, as performed by LeBoeuf, should be
6 excluded as both executive and confidential. We disagree for the following reasons.

7 Executive Status

8 The MBTA argues that LeBoeuf is an executive because he controls the operations
9 of the Capital practice group on a daily basis, supervises attorneys in the Steelworkers
10 unit, develops and implements uniform policies in procurement and contracts, and worked
11 on procurement matters in connection with the Fiber Optic Resiliency Project. We address
12 each of these points.

13 The 2000 stipulations provide that parties who “control the operations and
14 performance of an MBTA department or subdivision,” should be excluded as executive
15 employees. The stipulations do not define the terms “department” or “subdivision.”
16 Therefore, to determine whether the practice areas at issue here are MBTA departments
17 or subdivisions for purposes of this factor, we examine which department or section heads
18 have previously been excluded as executives. In the 1995 MBTA decision, the LRC
19 excluded Feltner, the head of the Trials and Claims section, who, as the head of the
20 “largest of the law department’s four sections,” reported directly to the General Counsel
21 and supervised 10 attorneys and 11 additional personnel. 22 MLC at 1141. When
22 analyzing Feltner’s executive status, the LRC stated that it could not ignore the magnitude
23 and importance of the Trials and Claims section within the Law Department, and the

1 Authority as a whole.⁶⁴ It also considered that Feltner delegated “case assignment and
2 the day-to-day supervision of the Claims unit to other attorneys subordinate to him.” Id.
3 Notably, the LRC did not exclude as executives those employees to whom those tasks
4 had been delegated. Those employees included Condon, the head of the Claims unit,
5 who then reported to Feltner and directly or indirectly supervised 10 employees. Id. at
6 1132. After 2000, the MBTA continued, without protest from the Union, to exclude the
7 heads of law department sections or subdivisions who reported directly to the General
8 Counsel, including Feltner, Kelly (contracts), and Feuerbach’s former supervisor Deputy
9 General Counsel Armstrong. However, the MBTA continued to include Condon, who was
10 still in charge of the Claims unit, and reported to an administrator below the level of
11 general counsel.

12 Given the foregoing, we decline to treat any of the practice areas within the COEs
13 as a “department or subdivision” for purposes of determining whether any of the disputed
14 positions “control the operations and performance of an MBTA department or
15 subdivision.” Instead, we find that when construing these terms for purposes of giving
16 effect to the parties’ agreement, the applicable department is the Legal Department and
17 the applicable subdivisions are the COEs. The practice areas are essentially subdivisions
18 of subdivisions. Since 1995, leading analogous business units have not been among
19 those criteria that the parties mutually understood would exclude an individual as an
20 executive. For these reasons, we find that the Senior Lead Counsel, Capital Delivery,

⁶⁴ It did not make similar findings for either the Contracts or Real Estate section. Id. at 1141.

1 does not control the operations of an MBTA department or subdivision for purposes of
2 the executive status analysis.

3 Turning to the other criteria in the analysis, while we agree that LeBoeuf controls
4 the operations of the Capital Delivery group on a daily basis, including supervising and
5 assigning work to one employee in the Steelworker unit, his responsibilities in this regard
6 are not materially different from those performed by Condon, a longstanding member of
7 the Steelworkers bargaining unit. Regarding the development and implementation of
8 policies, we acknowledge that LeBoeuf has drafted templates for a number of important
9 contract provisions, like ADR and delay claims. However, Morse has also worked on
10 reviewing and updating MassDOT and MBTA policies, like advertising, social media, and
11 privacy. Moreover, given the reporting structure and LeBoeuf's own testimony that he
12 runs major policy issues through Caldarelli and Breen, we do not find that LeBoeuf has
13 the independent authority to develop or implement the policies set forth in these
14 provisions.

15 LeBoeuf's procurement functions are not significantly different from those of other
16 bargaining unit members. Like Morse, Condon, and McCormack, he works with outside
17 counsel. On the Fiber Optic project, he, along with outside counsel and other members
18 of the Fiber Optic Team, developed procurement proposals and drafted the contract that
19 was included with the RFP. He also reviewed the RFQ and RFPs to ensure that they met
20 applicable requirements. These duties are virtually the same as those listed on the 2013
21 Assistant General Counsel posting for DePierro's position, which included assisting in the
22 "development, maintenance, and implementation of the Authority's procurement
23 processes, policies and procedures, including drafting and developing contracts, RFQ/Ps,

1 procurement forms...and document retention.” According to the job posting, bargaining
2 unit Senior Project Managers also “assist in the procurement of consultants and contracts
3 as required.”

4 As to other matters, although LeBoeuf’s sign-off authority on change orders is
5 higher than that of other bargaining unit members, \$500,000 versus \$175,000 for
6 McCormack, LeBoeuf’s signature signifies approval as to form, not content. His approval
7 is therefore based on his professional competence and expertise but does not represent
8 discretionary approval of the need for or the substance of the change order. The LRC
9 has granted collective bargaining rights to MBTA attorneys performing similar functions.
10 MBTA, 22 MLC at 1143 (authority vested in assistant general counsels is “necessitated
11 by the requirements of their positions and does not equate to the authority delegated by
12 an employer to its managerial or executive employees”).

13 In light of the above, and where there is no evidence that LeBoeuf has the
14 independent authority to initiate and recommend discipline, adjust grievances, or make
15 or effectively recommend decisions about whether to hire, transfer, suspend, promote or
16 discharge employees, we conclude that the position of Senior Lead Counsel, Capital
17 Delivery is not an executive position.

18 Confidential Status

19 The MBTA also argues that LeBoeuf is a confidential employee because he assists
20 other executive or confidential employees by attending weekly Office of General Counsel
21 meetings. There is no evidence that labor relations matters are discussed at this meeting,
22 however, or that attending these meetings would place LeBoeuf or any of the other Senior
23 or Senior Lead Counsels in a position of a real or apparent conflict of interest with

employees in their potential bargaining unit. Instead, the evidence shows that the purpose of the meetings is to help ensure consistency within the Legal Department by providing updates on new or ongoing legal matters, including matters that staff attorneys have previously identified as “hot topics” for discussion. Standing alone, therefore, attending these meetings does not establish that LeBoeuf is a confidential employee.

John Martin – Senior Lead Counsel, Contract

Executive Status

The MBTA contends that Martin is an executive based on his control of operations, supervisory status, policy development, and implementation and procurement responsibilities. We do not agree that Martin’s duties and responsibilities warrant his exclusion from the unit.

First, for the reasons set forth in the preceding section, we find that Martin does not exercise control over a department or major subdivision because Contracts is one of several practice areas within the Commercial Transactions COE. Although the employees in this practice area perform important and high-profile work, there are only four persons in the department, just as there were in 1995, and the head of the department, Martin, reports to Caldarelli, and not directly to the General Counsel.

With respect to supervision and staffing issues, Martin supervises one attorney in the Steelworkers bargaining unit, and two MassDOT attorneys. While Caldarelli may have asked Martin to “think about” staffing issues and has delegated case assignment and day-to-day supervision of the contract to him, there is no evidence that Martin has the independent authority or discretion to transfer employees, to reduce or increase

1 staffing levels, or make other level of services decisions that would indicate executive
2 status.

3 Martin's involvement in policy making on specific projects, even complex ones like
4 Widett Circle, Parcel 13, or those addressed by the Southwest Area strategy group, is
5 similar to LeBoeuf's, i.e., he is a lawyer providing professional services within his area of
6 expertise. The fact that his responsibilities include negotiations and advice regarding
7 complex aspects of railroad law does not change this result. In the 1995 MBTA decision,
8 the LRC declined to exclude an employee who also negotiated and advised on issues
9 pertaining to private carriers and made findings and recommendations to the Board of
10 Directors for review and action. 22 MLC at 1135 (discussing duties of an attorney in the
11 General Law section). Although Martin provides these services to high-ranking MBTA
12 and MassDOT personnel, the record does not reflect that he has independent discretion
13 to create the policies, and there is insufficient evidence in the record to conclude that the
14 advice he provides "effectively controls and implements the policy." MBTA, 22 MLC at
15 1140-1141 (quoting NLRB v. Yeshiva University, 444 U.S. at 682-683, n. 17). Further,
16 although Martin may be involved in several sensitive and strategic negotiations, Martin
17 acknowledged that there are strategic considerations in all negotiations. Accordingly, his
18 role as counsel during these discussions or negotiations "does not equate to the authority
19 delegated by an employer to its managerial or executive employees." Id.

20 Regarding procurement, Martin works with outside counsel, but there is no
21 evidence that he makes recommendations or decisions regarding their hire or continued
22 use. He also oversees the procurement process at the Transportation Building by
23 reviewing the procurements sought by the Building Services Division for completeness

1 and compliance. There is no evidence, however, that he decides whether to procure
2 goods or services in the first instance, or what goods or services to procure. The fact that
3 he oversees other attorneys performing these duties does not change our analysis as
4 other bargaining members like Condon have, since the inception of the unit, also
5 exercised daily supervision over employees in their unit.

6 In light of the above, and where there is no evidence that Martin has the
7 independent authority to initiate and recommend discipline, adjust grievances, or to make
8 or effectively recommend decisions about whether to hire, transfer, suspend, promote, or
9 discharge employees, we conclude that the position of Senior Lead Counsel, Contracts
10 is not an executive position that should be excluded from the unit.

11 Confidential Status

12 The MBTA argues that Martin is a confidential employee because he attends COE
13 meetings and because he assists other executives in a confidential capacity. For the
14 reasons set forth above, attendance at COE meetings is not dispositive of confidential
15 status. As far as assisting other executives in an executive capacity, there is no dispute
16 that Martin's advice, like that of other attorneys to their clients, is generally considered
17 confidential and privileged. Since at least 1972, however, the LRC/CERB has found that
18 attorneys are professional employees with bargaining rights under the Chapter 150E and
19 150A. Massachusetts Turnpike Authority, 31 MLC 87, 107, CR-04-3729 (December 15,
20 2004) (citations omitted). To be excluded as confidential employees, therefore, public
21 sector attorneys must do more than provide confidential legal advice to confidential or
22 executive employees. Rather, in accordance with the 2000 stipulations, they must
23 routinely perform duties that place them in a real or apparent conflict of interest with their

1 role as bargaining unit members. Absent any evidence or argument that Martin has any
2 labor relations or other duties akin to those set forth in the stipulations, or routinely assists
3 someone who does, we conclude that he should not be excluded from the unit as a
4 confidential employee.

5 Senior Lead Counsel, Real Estate

6 Executive Status

7 The MBTA argues that Feuerbach, in her role as Senior Lead Counsel, Real
8 Estate, should be excluded from the unit as an executive employee because she controls
9 the operations of the Real Estate practice area, has hired and supervised employees,
10 develops and implements policy, and retains outside contractors and reviews their bills.

11 For the reasons set forth in the preceding sections, we find that the Senior Lead
12 Counsel, Real Estate, does not exercise control over a department or major subdivision
13 because it is a practice area within the Commercial Transactions COE. Although the
14 complexity and scale of Real Estate's work may have increased since 2000, as of 2021,
15 its composition is the same as it was in 1995 – one section head, and two attorneys. 22
16 MLC at 1133.

17 Regarding the other elements, Feuerbach's role in determining staffing levels and
18 hiring is greater than that of the other disputed positions. Before Bellino was hired,
19 Feuerbach helped assess the needs of the Real Estate practice area and recommended
20 that a new attorney position be created. She then helped draft a new job description,
21 reviewed resumes, and participated in interviews. She played a similar role with respect
22 to Rhoades, the other Senior Lead Counsel position in Real Estate. Before he was hired,
23 Feuerbach helped determine the need for the new position, helped draft the job

1 description, reviewed resumes, and interviewed candidates. Once both attorneys were
2 hired, Feuerbach was responsible for training them. On procurement matters, Feuerbach
3 recommends hiring outside counsel and independent contractors and manages their
4 work. Based on these factors, we find that Feuerbach recommends and, with others,
5 makes decisions regarding staffing levels, subcontracting, and outsourcing.

6 With respect to policy, her role is mostly akin to Martin's – advising high-ranking
7 MBTA officials on complex legal matters that require her considerable expertise and
8 judgment. Although Caldarelli gives her a lot of autonomy in performing her work and the
9 scope of her work is greater than Armstrong's, this is due partly (and self-admittedly) to
10 her years of experience and personal work style. As with the previous two positions
11 however, the evidence does not reflect that Feuerbach is the final decision maker on
12 policy issues, nor is there evidence that the advice that she provides "effectively controls
13 and implements the policy." Id. Instead, and especially on some of the more sensitive and
14 high-profile matters, such as presenting matters to the Board, or dealing with the
15 Governor's office, Breen handles these duties. Regarding supervisory authority, although
16 Feuerbach reviews the work of the attorneys in her office, many of the leases require
17 further review by Caldarelli or Breen.

18 Some other factors distinguish Feuerbach from the other Senior Lead Counsels,
19 including that she reports directly to Breen on complex air rights issues, and that she
20 participated with the highest levels of administration in deciding to close parts of the
21 Massachusetts Turnpike during the COVID-19 pandemic, an important policy decision.
22 When these distinguishing factors are combined with the key role that Feuerbach plays
23 in staffing decisions, including determining the need for additional attorneys in her section,

1 determining what those duties should be, and serving on the hiring committee, as well as
2 determining the need for outside counsel and contractors, we find that Feuerbach meets
3 the criteria to be excluded from the bargaining unit as an executive employee.⁶⁵

4 GLX Program Counsel

5 Executive Status

6 The MBTA argues that Percac should be excluded as an executive employee
7 because he controlled all legal aspects of the GLX project, dealt with public officials on
8 public policy concerns, and oversaw various important procurement functions. First, we
9 disagree that he controls the overall operations of the GLX project. That function lies with
10 the GLX Program Manager to whom Percac reports. Indeed, both Percac's job
11 description and Percac's own testimony reflect that the GLX Program Manager and
12 overall program are Percac's client. Thus, as stated on the job description, rather than
13 controlling the program, Percac provides legal and policy advice "*in support* of the GLX
14 Program Manager and GLX Program Management Team."

15 As to other executive factors, Percac does not supervise any employees and there
16 is no evidence that he makes decisions regarding staffing levels, subcontracting,
17 outsourcing or purchasing, or effective recommendations regarding hiring, layoff,
18 discipline, or discharge of employees. Rather, similar to the duties performed by the
19 Assistant General Counsel II in Design and Construction position held by DePierro, his
20 role is to draft and negotiate contracts agreements on a variety of contract, procurement,

⁶⁵ The MBTA also argues that Feuerbach should be excluded because she directly assists other executive and confidential employees in a confidential capacity. We reject this argument for the reasons set forth in our analysis of the Senior Lead Counsel, Contracts position and do not rely upon it in determining that Feuerbach is an executive employee.

1 and other legal issues arising out of a particular project. While his duties have included
2 meeting with stakeholders on public policy concerns like easements, his role is to explain
3 the policy, not independently control or implement it. McCormack has similar duties.

4 Confidential Status

5 Based on his provision of legal and strategic advice to the GLX Program Manager,
6 the MBTA also argues that Percac assists other executive or confidential employees in a
7 confidential capacity. The evidence does not reflect, however, that Percac routinely
8 provided legal advice to Dalton regarding matters of a confidential nature, as the parties'
9 2000 stipulations require. There is no evidence that he is involved in labor relations
10 matters or is routinely exposed to confidential labor relations information. Although he
11 investigated an allegation that a contractor had harassed an employee, this single
12 incident does not suffice to warrant his exclusion as a confidential employee, especially
13 since McCormack has also handled a workplace investigation. Compare MBTA, 22 MLC
14 at 1142 (General Law section head excluded as confidential where she "routinely"
15 provided advice to personnel within the Authority's labor relations department).

16 For these reasons, we decline to exclude the GLX Program Counsel, or similar
17 positions, from the bargaining unit based upon confidential or executive status.⁶⁶

18 Senior Counsel, Tort Litigation

19 Executive Status

20 The MBTA argues that Spencer is an executive employee because he controls the
21 Tort Litigation department, sometimes fills in for Managing Counsel Carey, and produces

⁶⁶ The MBTA argues that Percac should also be excluded because he does not share a community of interest with other bargaining unit members. We address that argument in the final section of this decision.

1 reports for the General Counsel and CFO from the legal case management database.
2 For the reasons set forth above, we reject that Tort Litigation is a MBTA department or
3 subdivision for purposes of determining executive status. As explained above, the
4 Litigation COE is the relevant department for this analysis. The fact that Spencer
5 sometimes fills in for Carey does not change this result because there is no evidence that
6 Spencer has done this on a regular or long-term basis. We also note that Hogan, the
7 Supervisor of the Operations Control Center, did not lose his bargaining unit status
8 despite serving as Acting Deputy Division Chief for approximately six months.

9 The MBTA also relies on Spencer's supervisory and hiring responsibilities,
10 particularly his role in hiring Walsh and Skinner. The evidence reflects that Spencer
11 participated in hiring these two attorneys, but because both were hired to backfill existing
12 attorney positions, there is no evidence that this was a level of staffing decision – i.e.,
13 there is no evidence his involvement extended to determining whether the positions were
14 still needed. As such, his role in hiring employees is comparable to Condon's, who also
15 reports to Carey, and was involved in hiring the three employees who reported to him.
16 McCormack has similarly been involved in hiring resident engineers on his projects. As
17 to other supervisory indicia, Carey determines what work and whose work Spencer
18 should supervise and then delegates that work to him. Spencer's supervisory duties
19 consist mainly of overseeing and reviewing the newer attorneys' work, and there is no
20 evidence that he is involved in layoffs, grievances or disciplinary issues. His role is
21 therefore comparable to the bargaining unit attorneys in the 1995 decision to whom
22 Feltner delegated assignment and oversight duties.

1 As to policy-making, Spencer has drafted some policies, including developing in-
2 house and outside guidelines for attorneys handling litigation matters. The policies were
3 subject to Carey's approval, however, and there is no evidence that the advice he
4 provided effectively controlled or implemented the policy. Like many bargaining unit
5 members, he works with outside counsel. Although he also prepares a budget, it is
6 subject to Carey's approval, and Spencer has no authority to sign off on task orders or
7 settlements.

8 As to preparing case management reports, this is not an executive function. Prior
9 to the institution of the case management system, Morse and C. Martin worked on inter-
10 departmental audits to compile a list of cases with high potential exposure. C. Martin also
11 met with AON to set the reserves on cases, and Perez produced reports for the Risk
12 Manager. Spencer's responsibilities with respect to risk management matters, while
13 important, also do not involve significant levels of discretion or policy-making. Instead, he
14 works to develop pitches to explain existing systems and claims history for potential
15 insurance underwriters. Further, other bargaining unit members like Perez and Condon
16 routinely address risk management issues.

17 In sum, none of the factors that the MBTA relies upon to argue that Spencer is an
18 executive employee persuade us that he should be excluded from the bargaining unit as
19 an executive employee.

20 Senior Counsel, Regulatory Compliance

21 Confidential Status

22 The MBTA argues that Ferch is a confidential employee based on his investigation
23 of employee misconduct, including responding to grand jury subpoenas and investigating

1 whistleblower complaints. The MBTA contends that in carrying out his duties, Ferch
2 routinely consults with other executive or confidential employees in a confidential
3 capacity.

4 We agree that Ferch should be excluded from the unit. The evidence shows that
5 internal investigatory duties comprise between 30-60% of his workload. Further, the
6 parties agreed in the 2000 stipulations that employees who routinely conduct internal
7 investigations of employees for security or other reasons should be excluded from the
8 unit. Should those investigations involve bargaining unit members, excluding Ferch
9 would also be consistent with the line of cases cited above that excludes employees
10 whose performance of their duties could conflict with their loyalty to the unit. See
11 Commonwealth of Massachusetts Chief Administrative Justice, 5 MLC at 1707; City of
12 Boston, 2 MLC 1353; Town of Wellesley, 1 MLC 1389.

13 Community of Interest

14 Having determined that four out of six of the disputed titles are not executive and/or
15 confidential employees excluded from collective bargaining rights, we turn to the last
16 issue before us, whether the remaining four positions share a community of interest with
17 other bargaining unit members to warrant accretion to the unit.

18 To determine whether employees share a community of interest, the CERB
19 considers such factors as similarity of skills and functions, similarity of pay and working
20 conditions, common supervision, work contact, and similarity of training and experience.
21 Waltham School Committee, 25 MLC 137, 139, MCR-4541 (March 1, 1999) (additional
22 citations omitted). No single factor is outcome-determinative, and minimal differences do
23 not mandate separate bargaining units where employees perform similar job duties under

1 similar working conditions and share common interests that would be amenable to the
2 collective bargaining process. University of Massachusetts, Amherst, 41 MLC 233, 241,
3 SCR-14-3687 (February 20, 2015) (additional citations omitted).

4 Here, the Senior Lead Counsel, Contracts, Senior Lead Counsel, Capital Delivery,
5 GLX Program Counsel, and Senior Counsel, Tort Litigation share similar skills and
6 functions with lawyers in the bargaining unit. They are all required to have a law degree,
7 practice law, and use their legal skills and knowledge on the MTBA's behalf. They all
8 work in the MBTA's legal department and report to a Managing Counsel, who in turn
9 reports to the General Counsel. While each of their salaries is higher than the Assistant
10 General Counsel rate of \$117,616, with the exception of Percac, who earned over
11 \$150,000 as of 2021, their salaries fall near, but below, the highest Steelworker salary of
12 \$143,653.

13 The MBTA argues that the positions do not share a community of interest with
14 other bargaining unit members because they supervise employees in their bargaining
15 unit. However, as explained above, while the disputed counsel titles play some role in
16 hiring employees and assigning cases, there is no evidence that they have the authority
17 to decide and adjust employee grievances or to make effective recommendations
18 regarding hiring, layoff, discipline and discharge of unionized employees. Further, since
19 the inception of the unit, bargaining unit members have also assigned cases to other
20 bargaining unit members, and Condon has even been involved in some disciplinary
21 matters. Finally, in the 2000 decision, the Steelworkers unit was described as a
22 supervisory unit. Even assuming that the employees at issue here are true supervisors
23 who supervise other unit members, which they are not, the only way to avoid conflicts of

1 interest would be to create separate bargaining units for each layer of supervision. We
2 decline to do so. The CERB has previously expressed strong reservations about adopting
3 an approach to bargaining unit determination that creates more than one supervisory
4 bargaining unit in a particular group. See Sheriff of Worcester County, 30 MLC 132, 138,
5 CAS-03-3543 (April 7, 2004). Accordingly, the supervisory duties exercised by the
6 disputed positions do not warrant excluding them from the Steelworkers unit, especially
7 given all other evidence that they share a community of interest.

8 We finally address the MBTA's argument that Percac should be excluded from the
9 unit for lack of community of interest because, unlike the other employees, he reports to
10 a Program Manager, worked in a different location than other attorneys, at least until the
11 onset of the COVID-19 pandemic, has a higher salary, and because the nature of his
12 work is temporary and time-limited.

13 As we have noted, Percac's duties were very similar to those performed by
14 DePierro and McCormack in terms of procurement and project manager duties. Further,
15 although he reported to the GLX Program Manager on a daily basis, he also reported to
16 Caldarelli, who in turn reported to the General Counsel. The difference in his salary does
17 not, standing alone, warrant his exclusion because it is not that far beyond the range of
18 bargaining unit members' salaries. Although there is scarce evidence that he had contact
19 with other bargaining unit members, the fact remains that for at least four years, he was
20 an MBTA attorney, working on MBTA legal matters and reporting to a Managing Counsel
21 to whom multiple other bargaining unit members also reported. That would ordinarily be
22 enough to establish a community of interest and continuity of employment to justify
23 granting collective bargaining rights for at least the period of the project. Given the

1 passage of time, however, it is likely that the GLX Program Counsel position no longer
2 exists. If that is the case, then the CERB declines to accrete the position to the unit. If
3 Percac is still employed by the MBTA in a program manager capacity that is similar in all
4 material aspects to the one that he held, the parties are encouraged to agree to include
5 that position, or other similar long-term project counsel positions, in the bargaining unit.

6 **Conclusion**

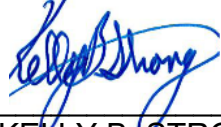
7 For the foregoing reasons, we grant the Union's petition to accrete the Senior Lead
8 Counsel, Capital Delivery; Senior Lead Counsel, Contract; and Senior Counsel, Tort
9 Litigation to the Steelworkers' bargaining unit. We deny the petition to accrete the Senior
10 Lead Counsel, Real Estate, and the Senior Counsel, Regulatory Compliance to the
11 bargaining unit. We grant the petition with respect to the GLX Program Counsel only if
12 that position still exists.

SO ORDERED.


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