

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

In the Matter of

UNIVERSITY OF MASSACHUSETTS (BOSTON)

and

JOINT EXECUTIVE COUNCIL/PSU/MTA

Case No. CAS-22-9297

Issued: July 23, 2024

CERB Members Participating:

Marjorie F. Wittner, Chair
Kelly B. Strong, CERB Member
Victoria B. Caldwell, CERB Member

Appearances:

Ethan Mutschler, Esq. - Representing the University of Massachusetts

Mark Hickernell, Esq. - Representing the Professional Staff Union (PSU)

CERB DECISION

1 Summary

2 The Joint Executive Council, Inc. d/b/a PSU (Union or PSU) represents a
3 bargaining unit of full-time and regular part-time non-academic professional staff at the
4 Amherst (UMA) and Boston (UMB) campuses of the University of Massachusetts
5 (University or Employer). On May 11, 2022, the PSU filed a unit clarification petition
6 seeking to accrete the Executive Communications/Speech Writer position held by UMB
7 employee Paul Nuti (Nuti) to its bargaining unit.¹ The Union asserts that this position

¹ The Union initially sought to accrete two titles: "Director of Website Development" and "Staff Writer/Speech Writer." During the investigation, the Union clarified that the speech

1 should be accreted to its unit because the incumbent, like other PSU bargaining unit
2 members, is a non-managerial, non-confidential, and non-academic professional
3 employee. The University disagrees, claiming that the duties that Nuti performs render
4 him a confidential employee within the meaning of Section 1 of M.G.L. c. 150E (the Law).

5 Before, during, and after the conference, the parties submitted position statements,
6 affidavits and other documents regarding the disputed position. On June 17, 2024, the
7 DLR sent the parties a letter asking them to show cause why the petition should not be
8 resolved based upon the information summarized therein and seeking some additional
9 information. The University filed a response that included additional information. The
10 Union did not file a response. After reviewing the University's response, and incorporating
11 the additional information, the Commonwealth Employment Relations Board (CERB) has
12 determined that there are no material disputes of fact. For the reasons set forth below,
13 the CERB finds that the Executive Communications/Speech Writer is a confidential
14 position and declines to accrete it to PSU's unit.

15 **Background**

writer position it wished to accrete was the "Executive Communications/Speech Writer" currently held by Paul Nuti. On May 16, 2022, the Union filed a second accretion petition, CAS-22-9404, seeking to accrete the Director of the William Joiner Institute. The DLR consolidated both petitions for investigation. Before the informal conference, the Union reached a settlement with the University regarding the unit placement of the Director of Website Development and the Director of the William Joiner Institute, but never withdrew its petitions with respect to those titles. In the show cause letter, the DLR notified the Union that if it did not submit withdrawals within 20 days, it should show cause why the DLR should not dismiss the petitions with respect to those titles. The Union neither submitted withdrawals nor responded to the show cause letter. Accordingly, the CERB dismisses CAS-22-9297 with respect to the Director of Website Development, and dismisses CAS-22-9304 in its entirety. Unless the duties of those positions change, these dismissals are with prejudice to the Union filing new CAS petitions with respect to these titles.

1 PSU Bargaining Unit

2 In or around 1990, the DLR certified the PSU as the exclusive representative of all
3 full-time and regular part-time professional staff employees employed by the Amherst and
4 Boston campuses of the University of Massachusetts.² The recognition clause of the
5 parties' July 1, 2020 – June 30, 2023 agreement states in pertinent part:

6 The unit includes the following state job titles: Staff Administrator; Staff
7 Associate; Staff Assistant; Extension Specialist; Professional Technician I,
8 II and III; Construction Maintenance Engineer; Lecturer A (non-academic);
9 Academic Coordinator; Academic Coordinator A; Research Engineer;
10 Psychological Counselor; Principal Psychologist; Assistant Director of
11 Procurement; Athletic Trainer; Assistant Director of Guidance and
12 Counseling; Director of Sports Publicity; Registrar; Associate Dean of
13 Admissions; Superintendent of Building and Grounds; Editor; Assistant
14 Dean of Students.

15
16 The unit shall exclude all academic professionals, faculty members,
17 librarians I-V, all classified employees, all managerial employees, all
18 professional employees employed in a confidential capacity, all casual and
19 temporary employees and all other employees. All professional staff
20 employees in the following state job titles are specifically excluded from the
21 unit: Chancellor; Associate Chancellor, Assistant Chancellor; Vice
22 Chancellor; Associate Vice Chancellor; Assistant Vice Chancellor; Provost;
23 Associate Provost; Assistant Provost; Dean, Associate Dean: Assistant
24 Dean; Dean of Students; Controller; Chief Project Engineer; Director of
25 Research Computing Center; Research Fellow; Senior Research Fellow;
26 Director of Security; Director of Athletics; Senior Staff Physician; Staff
27 Physician; all Medical Doctors . . . ; Head Coach; Assistant Coach; Post
28 Doctoral Research Associate; Post Doctoral Research Fellow . . . ;Director
29 of Admissions at Boston . . . ; Director, Office of Sponsored Projects
30 (Boston).

31
32 All professional staff employees assigned to the following areas reporting
33 to the President's Office are specifically excluded from the unit: University
34 Controller's Office; University Treasurer's Office; Internal Audit Department;
35 Institute for Labor Affairs; Data Processing Center.
36

² The CERB takes administrative notice of the DLR's file in Case No. MCR-2198. The PSU was formerly known as the Professional Staff Organization.

As of the investigation, the PSU's bargaining unit consisted of approximately 1,100 employees. All UMB bargaining unit positions are assigned a position or grade level ranging from Grade 24 to Grade 41. In June 2022, the contractual salary range for a Grade 31 position was \$66,400 to \$99,600.

Office of Communications/Director of Communications

There is an Office of Communications within the Division of Marketing and Engagement (Division). Other offices in this Division include Marketing, Creative Services, Community Engagement, WUMB radio station, and Finance and Operations. The Director of Communications is currently DeWayne Lehman (Lehman).

When Lehman was hired in 2008, Keith Motley was UMB Chancellor, and Lehman reported to the Vice Chancellor in charge of Government Affairs and Public Relations.³ Since 2020, Lehman has reported to Vice Chancellor and Chief Marketing Officer Megan Delage Sullivan (Sullivan). Lehman also has a dotted line reporting relationship to the Chancellor's Chief of Staff. In 2022, Lehman's annual salary was \$146,737.

The Communications Department has primary responsibility for managing media relations and contacts, and for creating and distributing content to both the campus community and the public via the campus website, social media platforms, and through speeches, public statements, emails, press releases, etc. Under Chancellor Motley's administration, which ended around 2017, the Communications Department consisted of Lehman and approximately 2-4 PSU bargaining unit members whose duties included creating, editing and curating communications for the University's marketing,

³ The record does not reflect when the Communications Department became part of the Division of Marketing and Engagement.

1 engagement and communications functions. Bargaining unit staff also created general,
2 calendar-based communications on behalf of the Chancellor, such as drafting remarks
3 for public events and sending annual messages to the campus community. If the topic
4 involved a more sensitive matter, senior Communications staff worked with the
5 Chancellor's senior staff, including the Chancellor, to draft the communication.

6 Staff Writer/Speech Writer⁴

7 In February 2015, UMB posted an opening for a PSU bargaining unit "Staff
8 Writer/Speech Writer." The job description contained a general summary, which stated in
9 part:

10 The Speechwriter/Staff Writer, within the Division of Government Relations
11 and Public Affairs, will research and write primary documents that will
12 support university wide internal and external communications and the work
13 of the Chancellor's office and the Provost's Office, including speeches,
14 talking points, reports, letters, columns and other materials. The incumbent
15 will work collaboratively with a broad cross-section of university faculty, staff
16 and students, including senior administrators and deans, and will be called
17 upon to assist with related public relations, website, social media, or
18 marketing projects to support the Office of Communications and the
19 University.

20
21 The posting provided examples of this title's duties including:
22

- 23 • Work closely with the Chancellor's Office to research and write
24 speeches for public appearances and campus events; . . . ;
- 25 • Draft columns, memos, letters, weekly emails, and other materials to
26 support the Office of Communications and Chancellor's Office; . . .
- 27 • Develop strategy to elevate priority internal and external
28 communications and proactively propose, develop, and write
29 Chancellor's communications consistent with the university's Strategic
30 Plan and the Strategic Communications and Marketing Plan; ...

31 * * *

⁴ The University's job descriptions and offer letters vary in their spelling of "Speech Writer," sometimes using one word, sometimes using two. For the sake of consistency, we use "Speech Writer" throughout the decision, except when directly quoting from a document.

- Participate in Office of Communications planning meetings and contribute ideas to strengthen the University's internal and external communications.

The posting indicated that the incumbent reported to the Director of Communications and had no direct or indirect reports. The position level was Grade 31 on the PSU salary scale. The minimum qualifications were a bachelor's degree in English, Journalism, Communications or a closely-related field and a minimum of 5-7 years of professional speechwriting experience, preferably in an academic environment.

The University hired Mary Alice Gil (Gil) to fill the position. Gil reported to Lehman. Gil's duties included developing campus communications on behalf of the Chancellor's office under Lehman's direction. Gil did not report to or work directly with the Chancellor. Gil left the position in August 2016. Her annual salary at that time was \$56,470.

Due to hiring freezes, Gil's position remained vacant from 2016 until 2021. There were two interim Chancellors at UMB from 2017-2020, Barry Mills (Mills) and Katherine Newman (Newman). Mills drafted his own personal messages but when the communications involved sensitive content, his senior staff would consult with senior Office of Communications staff. Newman had primary authorship of her public remarks and statements. She did not have a dedicated speechwriter.

UMB Chancellor Marcelo Suárez-Orozco (Suárez-Orozco) was hired in the fall of 2020. At his initiative, the University created a new, non-unit position in or around April 2021 titled "Speechwriter/Executive Communications." The job description contained a general summary, which stated:

The Speechwriter/Executive Communications will research and write primary documents on behalf of the Office of Communications that will support university-wide internal and external communications and capture the vision and message of the Chancellor and the University. These include

1 Chancellor's speeches and talking points, Chancellor's reports to the Board
2 of Trustees, commencement and special event scripts, news stories and
3 profiles for University publications and the website, and other material as
4 needed. The position requires confidentiality and complete discretion for all
5 assignments and in particular those related to confidential policies and
6 [personnel] matters related to the ongoing COVID-19 global pandemic.
7

8 The position is located in the Office of Communications, within the Division
9 of Marketing and Engagement, and will work closely with the Chancellor's
10 office, senior administration, as well as a broad cross section of University
11 faculty and staff. The Speechwriter/Executive Communications will also be
12 called upon to edit and update the website as needed, contribute to social
13 media, and assist with the related public relations and marketing projects to
14 support the Office of Communications and the University.
15

16 The job duties listed in the job description included "Assisting the Chancellor and
17 Cabinet in writing confidential policies related to the ongoing COVID-19 pandemic," and
18 "Assist Human Resources with communications related to collective bargaining."⁵ The
19 job description included other duties that were similar to those listed in the 2015
20 speechwriter job description set forth above. The requirements were also substantially
21 the same, except that the Executive Communications position required 3-5 years of
22 professional writing experience as opposed to the 5-7 years of professional speech
23 writing experience required in the 2015 Staff Writer/Speech Writer job description.⁶

24 This position does not appear to have been posted. Instead, in June 2021, UMB
25 posted an opening for a PSU Grade 31 Staff Writer/Speech Writer position that was
26 essentially the same as the one that had been posted in 2015.⁷ The University did not fill

⁵ As of October 2022, Nuti had not issued any communications related to collective bargaining.

⁶ The record does not explain this discrepancy.

⁷ Sullivan explained in her affidavit that the position was posted "as the result of budget lines opening up to add additional communications staff" that had previously been frozen.

1 this position. Rather, at the Chancellor's Office's request, and in conjunction with Sullivan
2 and the Human Resources Department, the University decided to fill the Speech
3 Writer/Executive Communications position that was created in April 2021. On September
4 14, 2021, the University offered Nuti the position. Nuti's offer letter indicated that this was
5 a full-time, benefitted, exempt, professional, non-unit position with an annual salary of
6 \$145,000. Nuti began working for UMB on October 12, 2021.

7 Nuti reports to Sullivan and has a dotted line reporting relationship to the
8 Chancellor and the Chancellor's Chief of Staff. According to a Division of Marketing and
9 Engagement Organization chart that the University prepared in September 2022, there
10 are three positions higher on the organization chart than Nuti - Associate Vice Chancellor
11 (unfilled), Vice Chancellor/Chief Marketing Officer (Sullivan), and Chancellor Suárez-
12 Orozco.⁸ Nuti is on the same level of the organization chart as Lehman and six other
13 positions: Executive Director of Marketing (PSU), Director of Creative Services (PSU),
14 Associate University Editor (PSU), Director of Community Relations (non-union), General
15 Manager of WUMB (PSU), and Senior Director of Finance and Operations (PSU). As of
16 2022, there were two bargaining unit members working within the Department of
17 Communications. Both employees report to Lehman and perform duties previously
18 performed by Gill in addition to other communications duties.

19 Nuti's main duties include creating external and internal communications on behalf
20 of the Office of the Chancellor, the Provost, and other senior leadership in the form of

⁸ Nuti's title on that chart is "Director of Executive Communications/Speechwriter." It is not clear when or why his title changed from the "Speechwriter/Executive Communications" title referenced in the April 2021 job description and Nuti's offer letter.

1 public comments or speeches at public events, executive correspondence, and cover
2 memoranda. Nuti has also consulted with the Human Resources and the Labor Relations
3 departments regarding their responses to various campus union communication
4 campaigns and information requests, particularly with respect to COVID-19 pandemic
5 responses. When creating such communications, Nuti is in frequent and direct contact
6 with senior leadership on campus including Sullivan, Lehman, and the Chancellor's office,
7 which includes the Chancellor and/or the Chancellor's Chief of Staff. Although Nuti's
8 output includes routine campus communications, his focus is on executive
9 communications of a non-routine or mission-related nature. The University provided the
10 following four examples of communications that Nuti either drafted or collaborated upon
11 that related to active labor or personnel matters and/or UMB's strategic plan:

- 12 1. In February 2022, Nuti collaborated with Chancellor Suárez-Orozco and
13 Provost/Vice Chancellor Joseph B. Berger (Berger) on a letter from the Chancellor
14 and Berger to the "Campus Community" concerning the appointment of the Dean
15 of the College of Liberal Arts to chair a search committee for a Dean of the College
16 of Education and Human Development. The letter "condemned" what it deemed
17 "racially-charged treatment by members of the Faculty Council publicly calling into
18 question" this appointment.
19

20 The contents of this letter are at issue in a prohibited practice charge that Union
21 filed with the DLR on April 5, 2022 (SUP-22-9224).⁹ On October 19, 2022, a DLR
22 Investigator issued a complaint in that matter, which alleged that the letter was
23 directed at statements made by Jeffrey Melnick, the Faculty Staff Union's¹⁰
24 Communications Director, and that, by publishing the letter, Berger and other UMB
25 officials had interfered with, restrained, and coerced its employees in the exercise
26 of their rights guaranteed under Section 2 of the Law in violation of Section
27 10(a)(1) of the Law.

⁹ The CERB takes administrative notice of the charge and complaint in Case No. SUP-22-9224.

¹⁰ The Faculty Staff Union represents a unit comprised of faculty and librarians employed at UMB.

2. On September 7, 2022, Nuti helped draft a statement that Berger issued to the “campus community” describing the results of an assessment by external legal counsel of UMB’s Africana Studies Department and the Trotter Institute. The final paragraph of the letter states in part that legal counsel’s assessment “contains confidential and protected personal and situational information that cannot be distributed publicly as it would violate privilege and confidentiality of current and historical matters.” The PSU subsequently filed a grievance over the report and resulting personnel changes.

3. In 2022, Nuti was the sole author of a document titled “For the Times,” which contains UMB’s ten year (2022-2032) strategic plan. The report begins with a letter from the Chancellor, which states in part:

Over months of engaged, consultative work, UMass Boston came together to imagine and engineer the blueprint for the public urban research university of the future. Here we present the fruits of the work of 10 committees – involving hundreds of faculty members, staff, and students representing a diverse range of scholarly expertise, humanistic sensibilities, and community engagement.

4. A November 5, 2021 email authored by Lehman, in collaboration with the Vice Chancellor of Human Resources and Nuti, containing an update on COVID-19 protocols. The statement was from a group called the “Return to Campus Committee” and was issued under the direction of the Vice Chancellor for Human Resources to respond to concerns raised and information requests from campus unions about COVID 19 mitigation efforts and campus buildings air filtration standards. The statement contained separate sections on infection rates, vaccination and masking compliance, and on-going evaluation, maintenance and upgrading of air ventilation systems.

Opinion¹¹

To be considered a confidential employee within the meaning of Section 1 of the Law, the employee must have a continuing and substantial relationship with a managerial employee such that there is a legitimate expectation of confidentiality in their routine and recurrent dealings. Town of Provincetown, 31 MLC 55, 59, CAS-03-3553, CAS-03-3555 (September 24, 2004) (citing Framingham Public Schools, 17 MLC 1233, 1236, CAS-2838 (September 4, 1990)). The CERB has construed this statutory language to exclude

¹¹ The CERB’s jurisdiction is not contested.

1 those persons who have a direct and substantial relationship with an excluded employee
2 that creates a legitimate expectation of confidentiality in their routine and recurrent
3 dealings. Town of Medway, 22 MLC 1261, 1269, MCR-4350, MCR-4352 (October 23,
4 1995). Employees who have significant access or exposure to confidential information
5 concerning labor relations matters or other equally sensitive policy information,
6 management positions on personnel matters, or advance knowledge of the employer's
7 collective bargaining proposals are excluded as confidential. City of Everett, 27 MLC 147,
8 150, MCR-4824 (May 23, 2001); Town of Medway, 22 MLC at 1269. The CERB
9 traditionally construes all statutory exclusions narrowly to preclude as few employees as
10 possible from collective bargaining while not unduly hampering the employer's ability to
11 manage the operations. Silver Lake Regional School District, 1 MLC 1240, 1243, CAS-
12 163 (January 13, 1975).

13 Here, the evidence establishes that in his first year on the job, Nuti had frequent
14 and direct contact with senior leadership on campus, including the Chancellor, the
15 Chancellor's Chief of Staff, the Provost and Vice Chancellor, and the Vice Chancellor of
16 Human Resources regarding sensitive and non-routine campus issues affecting
17 bargaining unit members. Nuti's duties included collaborating with these senior managers
18 to address sensitive personnel or labor relations matters, including drafting responses to
19 union communications and information requests regarding COVID-19, and other
20 statements or letters involving bargaining unit members and personnel changes, such as
21 the letter "condemning" certain unionized employees, which resulted in an unfair labor
22 practice charge, and the statement discussing changes to certain academic departments,
23 which resulted in a grievance. These frequent collaborations on matters affecting

1 personnel and labor relations shows that Nuti had a direct and substantial relationship
2 with high-ranking campus officials that created a legitimate expectation of confidentiality
3 in their routine and recurrent dealings, and leads us to conclude that Nuti is a confidential
4 employee.

5 The Union makes two main arguments in support of accreting Nuti to the unit. It
6 contends that Nuti performs substantially the same duties as the bargaining unit speech
7 writer position that Gil held, and that the communications that Nuti worked on were
8 eventually released to the public. According to the Union, public communications can
9 never be confidential. We are not persuaded by either argument. Despite similar job
10 descriptions, Nuti, unlike Gil or other bargaining unit members who work in the
11 Communications Department, works directly with the Chancellor. Further, the matters
12 that he works on with the Chancellor and other managers involve non-routine and
13 sensitive personnel, labor relations and policy matters, as opposed to general, calendar-
14 based communications. And, even if the sensitive personnel, labor relations and policy
15 communications that Nuti collaborates on are eventually made public, until then, the
16 information that forms the basis of those communications, the decision or policy
17 expressed therein, and how those decisions or policies are going to be expressed in
18 writing is confidential information. The CERB has previously recognized this in the many
19 decisions it has issued holding that employees who have advanced knowledge of an
20 employer's labor relations proposals, disciplinary decisions, or responses to grievances
21 are confidential employees. See, e.g., Town of Falmouth, 39 MLC 376, 385-386, CAS-
22 12-1936 (June 24, 2013) and cases cited therein. Because this analysis and the term
23 "advanced knowledge" anticipates that the employer will eventually submit the proposals

1 to a union, issue discipline, or provide a grievance response, an employee's confidential
2 status cannot turn on the fact that the confidential information to which they are exposed
3 will eventually be made public. The same result must be obtained here, where Nuti
4 frequently participates in discussions and drafts documents concerning confidential
5 matters that precede the issuance of executive communications. It is his exposure to that
6 confidential information during his regular and recurrent collaborations with managerial
7 employees that renders Nuti a confidential employee.

8 Conclusion

9 For the reasons stated above, we conclude that the Executive
10 Communications/Speech Writer is a confidential employee within the meaning of Section
11 1 of the Law. Accordingly, we deny the Union's petition to accrete this petition to its unit.

12 SO ORDERED

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F. Wittner

MARJORIE F. WITTNER, CHAIR

Kelly B. Strong

KELLY B. STRONG, CERB MEMBER

Victoria B. Caldwell

VICTORIA B. CALDWELL, CERB MEMBER

