

In the Matter of SPRINGFIELD HOUSING AUTHORITY  
and  
AFSCME, COUNCIL 93, AFL-CIO  
Case No. WMAM-08-1030

**17.1** *confidential employee*  
**35.2** *confidential employees*  
**93.32** *reinvestigation of certification*

October 15, 2009  
Marjorie F. Wittner, Chair  
Elizabeth Neumeier, Board Member

Melissa Shea, Esq. *Representing the Springfield  
Housing Authority*  
Michael J. Maccaro, Esq. *Representing AFSCME, Council  
93, AFL-CIO*

### DECISION UPON REINVESTIGATION OF CERTIFICATION

#### Statement of the Case

On November 24, 2008, AFSCME, Council 93, AFL-CIO (Union) filed a Petition for Certification by Written Majority Authorization with the Division of Labor Relations (Division) seeking to represent a bargaining unit of employees employed by the Springfield Housing Authority (Employer or SHA). The Union's petition covered the following positions:

- Purchasing Manager
- Applications Manager
- Community Manager
- RAO (Section 8) Programs Specialist
- IT Technician
- Assistant Manager
- Accounting/Accountant I
- Program Clerk
- Stock Auditor, RAO (Section 8) Clerk
- Rental Assistant Section 8
- Inspection Clerk
- Trades Manager
- Administrative Assistant/Trades, and
- Rental Assistant Programs Specialist.

On December 24, 2008, the Employer filed a Motion to Dismiss the Union's petition, challenging the inclusion of certain positions.

The Division was designated as the neutral pursuant to Division Rule 14.19(4), 456 CMR 14.19(4), and conducted a confidential inspection of the evidence of written majority authorization that

the Union had previously submitted. The number of Employer challenges was insufficient to affect the result; therefore, pursuant to Division Rule 14.19(8), 456 CMR 14.19(8), the Division issued a Certification of Written Majority Authorization on March 31, 2009. The Division's Certification of Written Majority Authorization describes the unit as follows:

All full-time and regular part-time Purchasing Manager, Applications Manager, Community Manager, RAO (Section 8) Programs Specialist, IT Technician, Assistant Manager, Accounting/Accountant I, Program Clerk, Stock Auditor, RAO (Section 8) Clerk, Rental Assistant Section 8, Inspection Clerk, Trades Manager, Administrative Assistant/Trades, Rental Assistant Programs Specialist, excluding all managerial and confidential employees.

On April 2, 2009, the Employer filed a Motion for Reconsideration and Reinvestigation of the Certification based on Written Majority Authorization pursuant to Division Rule 14.15, 456 CMR 14.15, arguing that the Assistant Manager title is no longer in use, and that the following positions should be excluded from the bargaining unit: Purchasing Manager, Applications Manager, Trades Manager, Accountant I, and Rental Assistant Program Specialist. The Union initially opposed the Employer's Motion, but by letter dated April 21, 2009, agreed to exclude the disputed positions from the bargaining unit.

On May 11, 2009, the Employer filed an Additional Motion for Reinvestigation and Reconsideration of the Certification of Written Majority Authorization seeking to exclude an additional position - IT Technician - from the certified bargaining unit. The Division allowed the Employer's Motion over the Union's objection. Thereafter, the Employer and the Union submitted factual stipulations, joint exhibits and position statements to support their respective positions on this issue.

#### Stipulations of Fact

1. On or about November 21, 2008, AFSCME, Council 93 ("Union") filed a Petition for Certification by Written Majority Authorization seeking to represent a unit of employees employed by the Springfield Housing Authority ("SHA").
2. The Union's Petition seeks to include the position of IT Technician in the proposed bargaining unit.
3. SHA objects to the inclusion of the position of IT Technician in the proposed bargaining unit, as it believes the position is confidential under MGL Chapter 150E.
4. There are currently two IT Technicians employed by SHA.<sup>1</sup> One of SHA's IT Technicians is Terrelle Castle, a part-time employee who works 24 hours per week. SHA's second IT Technician is Michael Laprade, a full-time employee who works 40 hours per week. Mr. Laprade spends more time on the computer system relative to work in the rental assistance department; he is not limited to working with employees in this department. He is available

1. The job descriptions title one position as an "IT Technician" and the other position as an "IS Technician." We use the single title IT Technician as the Union and the Employer did in their stipulations.

to assist with computer issues that arise from other employees outside of the rental assistance department. Mr. Laprade and Ms. Castle cover employee computer problems for each other when either of them is absent from work.

5. SHA employs over 100 full and part-time employees, some of whom are already organized and represented by AFSCME.

6. Several employees of the SHA maintain confidential data in their SHA computers, in Word documents as well as in emails in Outlook.

7. The employees who maintain confidential data at the SHA are in the positions of: Executive Director; General Counsel; Assistant Executive Director (two positions); Chief Financial Officer (currently an outside contractor acting in that capacity); Human Resources Manager; Trades Manager; and Executive Office Manager.

8. SHA's employees maintain confidential passwords to access their email in SHA's Outlook system. Although email is password protected, the IT Technicians have authority to override the confidentiality of the password or change it to gain access to emails as necessary to assist employees or pursuant to Management direction.

9. The IT Technicians typically access employee email as part of troubleshooting or opening attachments that have compatibility issues (*e.g.*, when SHA's computer system is different from the sender's system). When assistance is needed by the IT Technicians, it is routine for the employee needing help to leave his or her office while the IT Technician works on that employee's computer. Under these circumstances, the IT Technicians have unsupervised access to employee email, including emails to and/or from the employees listed in paragraph 7.

10. The IT Technicians have access to documents created by all SHA employees and stored on SHA's computer system, including documents prepared and stored by the employees listed in paragraph 7. Documents can be viewed from the IT Technician's computer or on an individual employee's computer. Regardless of how the documents are viewed, the review of the documents is unsupervised as employees typically leave their office while the IT Technicians attend to computer problems.

11. IT Technicians also have access to "cookies" that are associated with certain internet websites and can see the sites that employees have viewed on the internet. In the case of collective bargaining strategy, there may be websites that the Executive Director, department heads or managers access for purposes of developing strategy or responding to union proposals that the IT Technicians would know are being viewed by these individuals. The IT Technicians could then visit these websites and view the same material with the understanding that employees within SHA that are responsible for setting collective bargaining strategy have been viewing these certain websites.

12. The IT Technicians are responsible for troubleshooting hardware and software, such as retrieving or opening documents or email, for all SHA computer users and for providing desk support for all SHA computer users, as is stated in the job description for both IT Technicians, even if they have not had occasion to date to perform this function for all SHA employees.

13. The IT Technicians have access to SHA computers, including the ability to remotely access SHA computers. Access to SHA computers by the IT Technicians cannot be tracked.

14. The Executive Director and his designees, including but not limited to Assistant Executive Directors, General Counsel, Human Resources Manager, Trades Manager, Chief Financial Officer, and Executive Office Manager are responsible for all collective bargaining matters on behalf of SHA related to bargaining unit employees at SHA.

15. It is the Executive Director's practice to use his computer routinely for work-related communications, including communications with the SHA Board of Commissioners as well as SHA's in-house general counsel and outside labor counsel on collective bargaining matters.

16. The work-related communications of the employees listed in paragraph 7 include letters, memoranda and emails related to collective bargaining strategy, union and management proposals, including advanced, non-public information on the employer's collective bargaining proposals and strategy, the bargaining process, minutes of meetings with AFSCME related to the various bargaining units, wage and salary information and surveys, drafts of memoranda of agreement, management's position on personnel matters, personnel litigation involving unions and employees, and related information.

#### Findings of Fact <sup>2</sup>

The position description for the IT Technician provides in relevant part as follows:

Position: IT Technician

Reports To: Director of Rental Assistance.

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#### POSITION SUMMARY:

Responsible for performing a wide variety of hardware/software installation, configuration and troubleshooting PC's and printers; HUD 50058 forms; design, maintenance and updating of SHA Web Site; security administration and PHA User Administrator; help desk support; updating of data bases; and also including Section 8 Homeownership program and other similar duties to support the computerization and computer systems of the operations of the department.

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Essential Functions

2. The jurisdiction of the Commonwealth Employment Relations Board (Board) is not disputed.

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3. Install, configure and troubleshoot hardware and software for both internal and external systems. Install and configure network and desktop printers and copy/fax machines, replace faulty hardware such as drives, CD Roms, memory, power supplies.

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POSITION EVALUATION SPECIFICATIONS

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CONFIDENTIAL DATA

Work with confidential Section 8 and related applicant information which may be of a legal nature and which if disclosed inadvertently may result in a detrimental external impact.

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The position description for the IS Technician provides in relevant part as follows:

Position: IS Technician  
Reports To: MIS Manager

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POSITION SUMMARY

Responsible for managing and maintaining Springfield Housing Authority’s Local Area Network (LAN) including: ensuring LAN’s optimum performance to deliver required information to end-users, and interacting properly with Wide Area Networks (WANs) such as the Internet. Design, install, and support Springfield Housing authority local-area network (LAN), wide-area network (WAN), network segment, Internet and intranet information systems as required.

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Essential Functions

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4) Troubleshoot end-user network issues and/or perform help desk support for users including training in software and system usage. Assemble PCs and related equipment and install hardware and software upgrades to equipment.

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POSITION EVALUATION SPECIFICATIONS

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CONFIDENTIAL DATA

Work with confidential related organization data which may be of a legal nature and which if disclosed inadvertently may result in a detrimental internal and external impact.

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Opinion

Pursuant to 456 CMR 14.15, for good cause shown, the Division “may reinvestigate any matter concerning any certification issued by it and, after appropriate hearing, may amend, revise or revoke such certification.” When a certification has been found to be inap-

propriate as a matter of law, it has been corrected under that provision. *Town of Harwich*, 35 MLC 122 (2009) (citing *Town of Burlington*, 5 MLC 1234 (1978)). The possible inclusion of employees who may be found to be confidential employees constitutes good cause to reinvestigate the certification issued on March 31, 2009.

Section 1 of MGL c. 150E (the Law) defines a confidential employee as one who directly assists and acts in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter. The Board has construed this statutory language to cover those individuals who have a direct and substantial relationship with an excluded employee that creates a legitimate expectation of confidentiality in their routine and recurrent dealings. *Town of Medway*, 22 MLC 1261, 1269 (1995). Only employees who have significant access or exposure to confidential information concerning labor relations matters, management’s position on personnel matters, or advance knowledge of the employer’s collective bargaining proposals are excluded as confidential. *Fall River School Committee*, 27 MLC 37, 39 (2000). The Board has narrowly construed this exception to preclude as few employees as possible from collective bargaining rights, while not unduly hampering the employer’s ability to manage its operations. *Silver Lake Regional School Committee*, 1 MLC 1240, 1243 (1975).

Our consideration of the confidential status of the IT Technicians begins with their relationship with their direct supervisors. One IT Technician reports to the MIS Manager, and the other reports to the Director of Rental Assistance. There is no evidence in the record demonstrating that either the MIS Manager or the Director of Rental Assistance should be excluded from collective bargaining as managerial employees, and no evidence that they maintain labor relations confidential information on their computer systems or participate in collective bargaining. Accordingly, the relationship between the IT Technicians and their direct supervisors does not require the IT Technicians to be excluded from the certified bargaining unit as confidential employees.

We next consider the Employer’s argument that the IT Technicians are confidential employees because its Executive Director, General Counsel, and certain managers use SHA’s computer systems to maintain confidential labor relations material and have a legitimate expectation of confidentiality from the IT Technicians who maintain the computer system. The stipulated facts show that the IT Technicians may access confidential labor relations information on the computers of certain SHA employees. In *Town of South Hadley*, 35 MLC 122 (2008), an information technology director, who had access to all town computers and user accounts, was found not to be a confidential employee because the record did not describe the information on the computers or demonstrate that he had unfettered access to town computers and user accounts. In this case, the evidence demonstrates that employees who are responsible for collective bargaining on behalf of the SHA maintain confidential data on their computers, including: letters, memoranda and emails related to collective bargaining strategy, union and management proposals, including advanced, non-public information on the employer’s collective bargaining proposals, and strategy, the bargaining process, management’s position on per-

sonnel matters, and personnel litigation involving unions and employees. The IT Technicians can access this information as part of their responsibility to troubleshoot computer glitches or to open attachments when a sender's computer differs from the Employer's computer system.

However, the evidence also reveals that the IT Technicians access confidential labor relations information as part of their duties only if an employee needs technological assistance with a document, e-mail or website containing confidential information. There is no evidence documenting the frequency of this type of assistance or demonstrating that the IT Technicians interact with an excluded employee in this capacity regularly or routinely. Consequently, the IT Technicians' exposure to confidential labor relations information is sporadic and largely dependent on the technological limitations of the computer system and its users. Although it is possible for the IT Technicians to see labor relations materials while opening an e-mail or an attachment, it appears equally likely that they might never view confidential materials. We will not exclude employees from collective bargaining who have a tangential rather than direct and substantial relationship with an excluded employee. Nor will we strip collective bargaining rights from employees because they have access to confidential information, where the evidence demonstrates that their exposure to that information is only potential or occasional, rather than routine. Accordingly, we do not find the IT Technicians at issue here to be confidential employees.

We are not persuaded by the Employer's additional arguments. The IT Technicians here differ significantly from the budget analysts that the Employer cites in *City of Lawrence*, 25 MLC 167 (1999), who "often" worked with the budget and finance director on labor relations matters. The IT Technicians' occasional and sporadic exposure to confidential labor relations information here is not comparable to those employees whose regular duties included costing out collective bargaining proposals. *City of Lawrence*, 25 MLC at 168.

Finally, we do not believe that the IT Technicians should be excluded from the certified bargaining unit because, as the Employer contends, their access to confidential information could benefit the Union in negotiations or litigation. The Employer can address any potential for unauthorized use of confidential information with the IT Technicians and their supervisors. An employer's abstract fears of a tactical disadvantage at the bargaining table are insufficient to render an employee confidential, especially in light of the Board's longstanding policy of applying the confidential exclusion narrowly to preclude as few employees as possible from collective bargaining. *Silver Lake Regional School Committee*, 1 MLC at 1243.

#### Conclusion

For the foregoing reasons, we find that the IT Technicians are not confidential employees within the meaning of the Law. Consequently, this position will remain in the bargaining unit that the Division of Labor Relations certified on March 31, 2009. However, we direct the Division of Labor Relations to amend the certification in accordance with the parties' agreement and exclude the following positions from the unit: Purchasing Manager, Applications Manager, Trades Manager, Accountant I, and Rental Assistant Program Specialist.<sup>3</sup>

SO ORDERED.

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3. We express no position on the Employer's assertion that these employees are confidential and/or managerial employees. However, because the Employer contends that these employees supervise other employees in the petitioned-for unit, and the Union agrees to their exclusion, we will amend the certification in conformity

with the parties' agreement. *Onset Water Department*, 36 MLC 25 (2009) (order excluding employee as managerial issued pursuant to parties' stipulation); *Worcester School Committee*, 22 MLC 1762 (1996) (supervisors excluded from a bargaining unit of employees whom they supervise.)