

In the Matter of CITY OF GLOUCESTER  
and

AFSCME, COUNCIL 93, AFL-CIO

Case No. CAS-12-2115

18.2 public employer  
34.91 accretion

May 30, 2014

Marjorie F. Wittner, Chair  
Harris Freeman, Board Member<sup>1</sup>

Naomi R. Stonberg, Esq. Representing the City of  
Gregor A. Pagnini, Esq. Gloucester  
Wayne Soini, Esq. Representing AFSCME, Council  
93

DECISION

SUMMARY

AFSCME Council 93, AFL-CIO (AFSCME or Union) seeks to accrete the title of “Manager of School Transportation Equipment and Emergency Generator Maintenance” (MST)<sup>2</sup> into its bargaining unit of City of Gloucester (City) Department of Public Works (DPW) employees, including custodial, maintenance and rink employees. The Union primarily bases its petition on a promise that the City’s personnel director allegedly made to the President of the City DPW unit to include the MST, a School District employee, in the City DPW unit. The City denies that any such representation was made and objects to the petition on a number of grounds, including that the MST is employed by the Gloucester Public Schools, not the City. Based on the following facts and for the reasons set forth below, the Commonwealth Employment Relations Board (Board) concludes that Sec-

tions 1 and 3 of MGL c. 150E preclude the Board from accreting the MST, a School District employee, into a bargaining unit of City employees.

STATEMENT OF THE CASE

The Union filed the petition on July 31, 2012. On October 30, 2012, the DLR held an informal investigative conference with both parties to discuss the issues raised by the petition. The parties submitted supporting documents, including affidavits, before and after the conference. After receiving this information, because it did not appear that there were any material facts in dispute, on January 21, 2014, DLR sent the parties a letter asking them to show cause why it should not resolve the matter based on the information contained in the letter. The show cause letter also requested some additional information, which the City and the Union provided on January 29 and February 3, 2014, respectively. Because their responses did not raise any material disputes of fact, the Board renders its decision on the facts set forth below.

FACTS

*The Bus Mechanic/MST Title, Generally*

The School Committee created the MST title around October 2005. Shortly thereafter, John Wheeler (Wheeler) entered into a contract with the Gloucester School Superintendent to serve in this capacity. Wheeler first began working for the Gloucester School District (School District) as a school bus mechanic in 1995. At that time, in addition to representing a unit of Department of Public Works (DPW) and other maintenance and custodial workers employed by the City (Local 687-A or DPW unit), AFSCME also represented a separate bargaining unit of School District “custodians, maintenance and rink” employees (Local 687).<sup>3</sup>

Wheeler has never been a member of Local 687, Local 687-A or any other City or School District bargaining unit, whether as a bus mechanic or the MST. Instead, from at least 1998 until the present, Wheeler’s terms and conditions of employment have been set forth in a series of one or two-year employment contracts between him, as an individual, and either the School Superintendent or the School District.<sup>4</sup> Wheeler’s contracts provide for his participation in the City’s various group insurance programs and the state retirement system, and state that “nothing in this agreement shall prohibit him” from joining the “MTR” (Mass Teachers Retirement) System.<sup>5</sup> The most recent contract the City provided was effective

1. Board Member Elizabeth Neumeier recused herself from this decision.

2. The record reflects a number of different names for the disputed title, including “School Transportation Mechanic” and “Transportation Maintenance Manager.” For the sake of consistency, we refer to this title to as the “Manager of School Transportation Equipment and Emergency Generator Maintenance,” which is how the title appears in the incumbent’s employment contracts with the School Superintendent.

3. AFSCME also represents a unit of School District clerical employees. The other bargaining units within Gloucester’s School District are: Teachers (Gloucester Teachers Association); Paraprofessionals (Gloucester Association of Educational Paraprofessionals); School Nurses (Massachusetts Nurses Association); Cafeteria Workers (Teamsters Local 42); Bus Drivers (Teamsters Local 42); Noon Supervisors (Noon Supervisors Association); Assistant Principals (Gloucester Administra-

tioners’ Association), and Crossing Guards and Bus Monitors (the record does not reflect the name of this group’s exclusive representative).

On the City-side, in addition to representing the DPW unit, AFSCME represents a unit of clerical and library workers and a unit of non-professional employees employed at the Housing Authority.

4. The preamble to Wheeler’s contracts from 1998-2010 listed the Superintendent as the other party. The most recent contract listed the “Gloucester Public School District” as the other party. Like all the other contracts, however, it was signed by the Superintendent.

5. The City benefits Wheeler receives are available to all School District employees who do not participate in the teachers’ retirement system.

employees were City employees who reported to the City's DPW director. The parties also do not dispute that the MST was not one of the School District titles transferred pursuant to the Transfer Agreement.

*Local 687-A 2011-2013 CBA and Recognition Clause*

At some point after the School Committee and the City entered into the Transfer Agreement, the City and AFSCME began negotiations for a new DPW contract. Although the record does not reflect when negotiations began, David Bain (Bain), the City's personnel director, and Teixeira attended bargaining sessions on January 26, February 23, and March 12, 2012.

On March 26, 2012, the parties executed a successor agreement, effective from July 1, 2011 to June 30, 2013 (CBA).<sup>12</sup> The CBA's recognition clause states:

The employer recognizes the Union as the sole and exclusive bargaining agent. . . for all municipal employees represented by said Union as more specifically set forth in Case No. MCR-31 decided by the Commonwealth of Massachusetts State Labor Relations Commission on January 20, 1971. Inclusions are attached.

All other positions are excluded. When a new position is created, the parties agree to meet to determine whether it shall be included or not.

The parties do not dispute that the MST position was not included in the attachment or mentioned anywhere else in the CBA. The CBA does however list two motor equipment/vehicle maintenance and repair titles, the "Motor Equipment Maintenance Man" and the "Lead Foreman Motor Vehicle Repairman." The City also provided a job description for the "Master Fleet Mechanic," who supervises the motor vehicle repairman and motor equipment maintenance man.

The CBA does not expressly reference the Transfer Agreement. It does, however, reflect the inclusion of the former members of Local 687-A in two places - in the list of included employees, which lists "rink maintenance employees," and under Article 6, "Work Hours," which lists all custodians' work hours by location, including "City Hall Custodian," "Custodians at all Elementary Schools," and "Custodians at Gloucester High School."<sup>13</sup>

*MST Unit Status and Successor Negotiations*

Before 2012, the Union did not seek to include Wheeler, in his capacity as the school bus mechanic or the MST, in any of its City or School bargaining units. The Union believed that Wheeler was an independent contractor and was unaware that he received City benefits. It was not until after June 30, 2011, when the parties were negotiating the transferred School District employees' terms and

conditions of employment, that Bain confirmed to Joe Biondo (Biondo), then President of Local 687-A,<sup>14</sup> that Wheeler was not an independent contractor, but an employee who received City benefits.

At the informal conference, Biondo claimed that Bain told the Union, "If you want him [Wheeler], he is yours." At the time Bain allegedly made this statement, Biondo understood that Wheeler had not been transferred over to the City's centralized facilities maintenance department as part of the implementation of the Transfer Agreement and that Wheeler still reported to School personnel.

Conversely, Teixeira stated that she never heard Bain tell the Union that the MST was going to be placed in the City's bargaining unit and that her notes do not reflect that Bain ever made this statement. Teixeira asserts that if she had heard Bain say this, she would have objected based on her position that the School District has and continues to have supervisory responsibility over the MST."<sup>15</sup>

On March 12, 2012, School Superintendent Richard Safier sent the following letter:

To Whom It May Concern:

In response to inquiries about Mr. John Wheeler's position relative to AFSCME, the school district wishes to point out that Mr. Wheeler is employed by and under contract with the school department and not the City. His position was not transferred over to the City through the Memorandum of Understanding between the City and the Gloucester Public Schools. Further, Mr. Wheeler does not share a community of interest with the members of AFSCME. He is the Manager of School Transportation Equipment for the Gloucester Public Schools.

Therefore, your request to accrete this position to the bargaining unit is denied.<sup>16</sup>

On March 26, 2012, Biondo signed the new CBA.

OPINION<sup>17</sup>

The issue before us is whether to accrete the MST, a School District employee into Local 687-A, a unit comprised of DPW, maintenance and custodial employees employed by the City. As a general rule, a unit clarification petition is the appropriate procedural vehicle to determine whether newly-created positions should be included or excluded from a bargaining unit or to determine whether substantial changes in the job duties of existing positions warrant either their inclusion or exclusion from a bargaining unit. *City of Malden*, 32 MLC 97, 99, CAS-04-3599 (November 2, 2005) (citing *Sheriff of Worcester County*, 30 MLC 132, 136, CAS-03-3543 (2004); *North Andover School Committee*, 10 MLC

12. At the informal conference, the City agreed to waive any objections it had to the petition under the contract bar rule, 456 CMR 14.06 (1)(b).

13. The list of included employees does not otherwise differentiate custodians or maintenance personnel that work in the schools from their counterparts who work in City buildings. Instead, it lists generic titles like "Maintenance Man" "Facilities Maintenance," and "Building Custodian."

14. Biondo served as Vice President/Steward of Local 687-A at the time of the informal conference.

15. This information is based on two affidavits from Teixeira, which were included in the City's submissions.

16. The Union provided a copy of this letter in response to the Show Cause notice, as evidence that, "notwithstanding Bain's assertion that the Union could have the position, in March, 2012 the MST position was nonetheless not included in the listed bargaining unit positions."

17. The Board's jurisdiction is not contested.

1226, 1230, CAS-2525 (September 27, 1983). Further, a unit clarification petition is appropriate if the outcome sought by the petition is “[c]learly supported by an apparent deficiency in the scope of the existing unit and must be, at least arguably, within the realm of what the parties intended when the unit was first formulated.” *City of Malden*, 32 MLC at 99.

What makes this case unusual is that the MST is not employed by the City since his title was not transferred over to the City under the terms of the Transfer Agreement. Rather, the MST has, at all times material to this case, been employed by the School District under the terms of an employment contract that he and the Superintendent of Schools signed. There is no evidence that the School Committee subsequently decided to transfer the MST or school vehicle maintenance/repair functions over to the City. Nor is there evidence that Bain was the School Committee’s agent or that the School Committee otherwise delegated authority to Bain to make unit placement or transfer decisions about non-professional school employees who were not transferred pursuant to the Transfer Agreement. Finally, both the School Superintendent and the School Committee’s representative on the City’s bargaining team have objected to accreting the MST into Local 687-A.

Notwithstanding these facts, the Union argues that accretion is appropriate because the City’s personnel director promised Local 687-A’s president that the MST could be part of its bargaining unit. The Union therefore claims that because the MST otherwise shares a community of interest with the other titles in Local 637-A, the Board should give effect to that promise and accrete the MST into the City’s unit. Under the Board’s three-part accretion analysis, we would ordinarily give effect to the parties’ agreement regarding the scope of their unit and accrete a newly-created title into a bargaining unit with which it shares a community of interest. *See generally Boston Public Health Commission*, 39 MLC 218, 229-230, CAS-11-1091, CAS-11-1092 (February 28, 2013) (setting forth three-prong accretion analysis). Even assuming without

deciding, however, that the City’s personnel director made this promise and that the MST shares a community of interest with the DPW unit, we decline to do so based on the language and policies underlying Chapter 150E, Sections 1 and 3.

Section 1 of the Law defines “employer” as: any “city... acting through its chief executive officer . . . In the case of school employees, the municipal employer shall be represented by the school committee or its designated representative or representatives.” Thus, in this case, because there is no evidence before us demonstrating that Bain was acting as the School Committee’s agent or, indeed, demonstrating the School Committee’s involvement at any level in Bain’s alleged agreement to place the disputed position in the Union’s unit, Bain’s alleged promise to place a school employee in a municipal bargaining unit is unenforceable.

Equally important is the fact that Section 3 of the Law requires that the Board’s determination of appropriate bargaining units “be consistent with the purposes of providing for stable and continuing labor relations. . .” In this regard, we recognize that municipal employers and school committees traditionally maintain separate bargaining units for municipal and school employees. We are unaware of any authority that gives a municipal employer the right to unilaterally designate a school employee a municipal employee without the school committee’s assent or vice versa. To give effect to Bain’s promise here would not only disregard the Section 1 statutory scheme for municipal and school employers, but also create instability between the two workplaces in contravention of the Board’s standards for making unit determinations under Section 3 of the Law.

For all of these reasons, the Board declines to accrete Wheeler into Local 637-A and this matter is dismissed.<sup>18</sup>

SO ORDERED.

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18. The Union argues that dismissal of this petition would leave Wheeler without union representation. We note that even though AFSCME no longer represent a separate unit of school custodians and maintenance employees, there are other

non-professional bargaining units within the Gloucester public schools into which the MST could potentially be accreted.