

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

CITY OF ROCHESTER,
Public Employer,

-and-

ROCHESTER PUBLIC EMPLOYEES ASSOCIATION,
Labor Organization-Petitioner.

MERC Case No. R15-I-080
Hearing Docket No. 15-058196

APPEARANCES:

Keller Thoma, P.C., by Richard W. Fanning, Jr., for the Employer

Ed Jacques, Director of Member Services, Technical, Professional and Officeworkers Association of Michigan, for the Petitioner

DECISION AND DIRECTION OF ELECTION

Pursuant to §12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, this case was heard on December 16, 2015, by Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based on the entire record, including briefs filed by the parties on February 2, 2016, we find as follows:

The Petition and Positions of the Parties:

On September 15, 2015, the Rochester Public Employees Association (the Petitioner) filed this petition for a representation election in a residual unit consisting of all full-time nonsupervisory employees of the City of Rochester (the Employer) not currently included in a collective bargaining unit, excluding confidential employees, executives, and supervisors.

Petitioner and the Employer disagree over whether three positions should be included in the residual unit. The first position is held by Holly Meyers, whose current job title is account technician, human resources and risk management. The second position is the assistant to the city manager/financial analyst, held by Anthony Moggio. The third position is the executive assistant to the city manager, Deborah Farrah.

The Employer maintains that Meyers should be excluded as an executive because she functions as the Employer's human resources director and has substantial City-wide policy-making authority. It also argues that Meyers should be excluded as a confidential employee because she has attended collective bargaining sessions, discusses ongoing union negotiations and the Employer's bargaining table positions with the city manager, has provided input on benefit proposals, and frequently advises the city manager and department heads on grievances.

The Employer maintains that the assistant to the city manager/financial analyst, Moggio, should be excluded as an executive because he has broad authority over the Employer's information technology function, has a substantial role in developing the Employer's budget, and has been involved in various other management projects, including calculating the cost of union proposals during contract negotiations and providing advice and input to the city manager on economic issues.

Petitioner asserts that neither Meyers nor Moggio qualify as an executive under our definition because neither is a policy-making head of a major department, and because neither exercise a substantial degree of autonomy in carrying out their duties and/or have direct access to the Employer's governing body. Petitioner also asserts that neither Meyers nor Moggio are supervisors, a position with which the Employer agrees.

Finally, the Employer asserts that the executive assistant to the city manager, Deborah Farrah, should be excluded from this unit as a confidential employee. The Employer asserts that Farrah performs confidential labor relations duties, including handling confidential correspondence and taking notes at weekly management meetings where employment and labor relations matters are discussed. Farrah also has access to the city manager's email account, giving her access to any confidential email communications between the city manager and the Employer's employment counsel. The Employer also argues that even if Farrah did not perform confidential duties, the Employer should be entitled to exclude her because it has no other clerical employees designated as confidential. Petitioner's position is that Farrah does not perform sufficient confidential work to be excluded as a confidential employee and that her confidential duties could easily be assigned to a supervisor or executive employee.

Findings of Fact:

Background

At the time the petition was filed, the Employer had fifty-four full-time permanent employees providing services to its approximately 13,000 residents. Twenty-four of these employees were in the City's Police Department and were represented either by the Police Officers Association of Michigan (POAM) or the Command Officers Association of Michigan (COAM). Thirteen others worked as laborers either for the Employer's Department of Public Works or its Parks and Recreation Department and were part of a bargaining unit represented by AFSCME. There were, in addition, eleven part-time and/or seasonal employees who were not included in any unit.

The Employer also had seventeen full-time positions that were not represented by a union. The parties agreed to exclude seven positions from the residual unit: the city manager, the deputy city manager/director of community development, the finance director/treasurer, the city clerk, the director of public works, and both the police chief and fire chief. As noted above, the parties disagree over whether three of the remaining ten positions should be included in the unit.

Account Technician, Human Resources and Risk Management

Meyers has been employed by the Employer for twenty-two years. Meyers is an hourly-paid employee. She has held several job titles during her employment with the Employer, beginning with cashier. At one point, Meyers' title was account technician, payroll. Her duties were primarily payroll-related, although Meyers, along with the then-assistant city manager, sat at the bargaining table during contract negotiations between the Employer and its police unions. The assistant city manager was also at that time the primary contact between the Employer and the providers of the various pension and insurance benefits the Employer offers to its employees. In 2008, after the assistant city manager left and his position was not filled, Meyers took over his employee benefit functions. In 2012 or 2013, the then-city manager began referring to Meyers as human resources and risk management and told her to have her business cards printed with that title.¹ In about 2014, the Employer created a new job description for Meyers under the title account technician, human resources and risk management. The job description states that the applicant should possess a Bachelor's degree in accounting, public or business administration, human resources or a related field.

Meyers spends between twenty-five and thirty percent of her time on payroll duties, for which she reports to Finance Director John Hiller. Her duties include the preparation of the biweekly payroll; payroll record keeping, including time sheets and W-2 forms; calculating and ensuring appropriate payroll deductions, including garnishments and child support; calculating the proportion of wages to be allocated to retiree health savings plans and sick pay; tracking worker's compensation and short-term disability claims and payments; calculating and administering employment termination compensation; assisting the Finance Department with wage and benefit reporting; and preparing estimates of wage and benefit expenses for use in the budgeting process, union negotiations, and management review.

Meyers reports to City Manager Wing with respect to her non-payroll duties. Meyers is responsible for overseeing the Employer's various pension plans, health savings plans and employee insurance programs. She arranges for and conducts open enrollments, ensures the Employer's compliance with COBRA requirements, and administers the tuition reimbursement program. Meyers has access to individual employee pension and benefit information and is authorized by the Employer to provide employees with this information. When the Employer recently decided to switch to a high-deductible health insurance plan, she participated in the discussions over the selection of the plan and made suggestions for features to be included in the plan.

¹ This city manager left in the early summer of 2015. The job was filled on an interim basis by Deputy City Manager Nicholas Banda until November 2015, when the current city manager, Chester Blaine Wing III, was hired.

Meyers, the Employer's employment counsel and the Employer's assistant to the city manager compiled the current employee handbook, which was issued in 2013. Meyers either drafted or helped draft most of the handbook's provisions.

The Police Department does the hiring for police officer positions. When positions in other City departments become vacant, Meyers is responsible for either advertising the position or contacting a staffing agency to provide candidates. Meyers hires seasonal and part-time laborers for both the Department of Public Works and Department of Parks and Recreations. For other positions, Meyers screens the candidates prior to interview. The interviews are then conducted by a panel that consists of Meyers, the head of the department with the vacancy, and sometimes other managers. The panel then makes a recommendation to the city manager. The panel attempts to reach a consensus, but the city manager makes the ultimate decision about whom to hire.

When an employee commits an infraction that makes him or her subject to discipline, it is the role of the city manager to decide what type and level of discipline is appropriate. However, the city manager generally discusses this issue with both the employee's department head and Meyers before making his decision. Meyers is not part of the grievance chain under any of the Employer's three union contracts, but she does sometimes provide advice to the city manager and department heads regarding grievances.

The Employer employs a contractor to handle its unemployment claims. When a claim is filed, Meyers communicates the Employer's reasons for termination to the contractor and gives it the Employer's position on whether benefits should be paid. The Employer also employs a firm of attorneys to handle its Worker's Compensation claims, and Meyers meets with them to discuss the facts surrounding these claims. Meyers is also responsible for contacting the Employer's employment attorneys when the Employer needs advice on a personnel or benefits matter; she testified that she recently called employment counsel to ask for advice when an employee requested to take time off for a medical procedure without using disability leave or FMLA leave. When the Employer decided to select a new firm of employment attorneys, Meyers participated, along with the city manager, deputy city manager, police chief and finance director, in interviewing prospective candidates.

In about 2010, the Employer updated, or in some cases prepared, written job descriptions for each of its positions. Meyers' role was to prepare lists of job duties for jobs with which she was familiar and then discuss her lists with the city manager. Meyers did not draft any of the actual job descriptions or approve the final versions.

As noted above, before 2008, Meyers participated in collective bargaining negotiations between the Employer and its police unions. After the former assistant city manager left in 2008, Meyers stopped attending bargaining sessions. However, she continues to have discussions with and provide advice to the city manager about the benefit packages the Employer might offer its unions during contract negotiations as well as other issues that may arise during bargaining.

The Employer holds regular weekly staff meetings for all managers and directors. Meyers attends some of these meetings, and she testified that collective bargaining negotiations have been discussed in staff meetings she attended. The list of job duties in Meyers' job description includes, "Conducts research for labor negotiations and prepares confidential reports regarding human resources issues." It is not clear from the record whether Meyers has prepared "confidential reports," or, if so, what they were.

Meyers' other duties include preparing solicitations for the Employer's property and liability insurance, maintaining insurance binders and property lists, and administering internal and external insurance claims. She obtains surety bonds for police officers. She is responsible for overseeing City staff vehicles, including reassigning titles when vehicles are sold. Finally, she provides assistance when City assets are sold.

Assistant to the City Manager/Financial Analyst

Anthony Moggio, the assistant to the city manager/financial analyst, has been employed by the Employer for six-and-one-half years. Moggio is hourly-paid. He has held his current title for a year and-a-half. Before that his title was cashier and then account technician, general ledger. According to Moggio, his current position was created after he proposed that his account technician position be consolidated with a vacant position, assistant to the city manager, and that some of his old duties as account technician be shifted to a new part-time position, customer service specialist. He also recommended that flex-time be instituted for all of the front office clerical staff, so that the Employer could expand its hours of service to the public. Moggio's suggestions were accepted by the then-city manager, and his current position was created as a result. Like Meyers, Moggio reports to the city manager for some of his duties and to the finance director for others.

According to his job description, Moggio, who has a BA degree in accounting, is responsible for "collecting, verifying, and balancing the General Ledger, as well as providing effective and efficient accounting and revenue receipt support" under the general direction of the finance director. Moggio also plays a significant role in the development of the Employer's budget. He meets with department heads to assist in developing their annual departmental budgets. This includes helping the department determine how much it needs in operating funds and how it can prioritize its needs. Moggio also checks to see how the department spent its funds in previous years and calculates the department's employee wage and benefit costs. The departments submit their budgets to Moggio, who then puts them together into an initial proposed City-wide budget for review by the finance director.

Although the Employer has a contractor that provides information technology services, Moggio has been assigned a variety of information technology duties based on his personal skills and knowledge. Before the former city manager left, the responsibilities now performed by Moggio were performed by the city manager. Moggio prepares an annual budget for the purchase of new and replacement technology equipment and software for all Employer departments, including public safety. If Moggio believes that a major purchase should be made, he includes it in his proposed budget. After the budget is adopted, Moggio can make purchases during the year within that budget without separate approval.

Moggio has reconfigured the Employer's computer network and set up a virtual private network giving the city manager and other managers access to their files from remote locations. Moggio also controls which employees have access to which software programs and which employees have remote access. The Employer's employee "acceptable use of technology" policy was in place before Moggio acquired his current position. However, if the information technology contractor flags an employee violation of this policy, Moggio discusses the incident with the employee and his or her supervisor and prepares a report. Moggio decides how often computer passwords need to be reset. He also trains employees on the use of software.

Moggio has not sat at the bargaining table in any of the Employer's negotiations with its unions. He has, at the request of the city manager, calculated the cost of proposals made by unions at the table. He has also offered suggestions to the city manager regarding counterproposals that might satisfy the unions but save money for the Employer. Moggio attends the weekly management staff meetings on a regular basis, and he confirmed that labor relations matters are sometimes discussed at these meetings. Moggio's job description states that he "conducts research for labor negotiations and prepares confidential reports regarding human resource issues," but Moggio was not sure to what this referred. His job description also states that he "manages various confidential documents and records pertaining to City affairs." Moggio testified that he regularly sees emails and correspondence from and to the city manager that the public would not normally see, although he was not sure whether these emails and correspondence would be exempt from disclosure under the Michigan Freedom of Information Act (FOIA).

Moggio frequently receives special assignments from the city manager, finance director, mayor and City Council. His duties, as set out in his job description, include "conduct research for the drafting of ordinances, resolutions, notices and other official city matters," "author and edit various communications as assigned," and "prepare, write, and administer grant programs as assigned." He meets with the city manager frequently throughout the week, sometimes multiple times during a day.

Executive Assistant to the City Manager

Deborah Farrah, who has been employed by the Employer since 2010, is the executive assistant to the city manager. She is hourly-paid. Farrah provides administrative support to the city manager, deputy city manager, mayor and city council. She prepares agendas for city council meetings and meetings of boards and commissions. She attends and takes notes at the weekly management meetings and at the weekly meetings held between the city manager and mayor. Farrah testified, however, she had never been present during a discussion of collective bargaining issues at any of these meetings. According to Farrah, there have been occasions when certain managers asked or were asked to stay after the end of a meeting to discuss a confidential matter. However, no notes were taken of those discussions and Farrah was not asked to remain.

The executive assistant to the city manager is expected to independently respond to certain letters and emails of a general nature. As directed, she drafts letters, memos and reports from shorthand notes, dictation, or edited documents for all of the persons to whom she provides administrative support.

According to her job description, she opens letters directed to the city manager and deputy city manager. However, Farrah testified that all their correspondence, unless it is marked personal or confidential, is opened by other clericals in the front office. Farrah has access to the city manager's email account. She maintains a variety of paper and digital files, including digital employee personnel files. She maintains the City website, including daily editing, and plans and coordinates the publication of the City newsletter. She orders office supplies.

Currently, the city manager and the deputy city manager constitute the Employer's bargaining team in contract negotiations with the Employer's unions. At the time of the hearing, the Employer was engaged in negotiations with the AFSCME unit and was considering ways to convert the unit's two-tier wage system into a single tier. Farrah, Meyers and Moggio, at the direction of Wing, were working together to prepare a wage matrix for the AFSCME unit to assist in this task. Wing testified that in the future he expects to ask his assistants, i.e., Farrah, Meyers, and Moggio, to conduct salary surveys indicating what comparable neighboring communities pay for jobs similar to the Employer's positions. Wing also testified that he would use his executive assistant to type and edit bargaining proposals and communications between himself and the Employer's labor counsel. He also testified that the executive assistant has in the past and continues to keep a binder of all correspondence between the city manager and representatives of the unions that represent the Employer's employees.

Farrah, however, testified that since Wing became city manager in November 2015, Wing had handled his own correspondence for anything to do with the Employer's unions. She also testified that she did not keep a binder of union correspondence until shortly before the hearing, when Wing told her to begin keeping one.

Discussion and Conclusions of Law:

As we stated in *City of Detroit*, 1969 MERC Lab Op 187, 193, executives are those employees "so intrinsically connected with the determination of policy that their engaging in concerted activities would damage, not enhance, the statutory purpose." The determination of whether an individual is an executive is made on a case-by-case basis. *Detroit v DOT Foreman's Ass'n*, 109 Mich App 141 (1981).

In *City of Detroit (Police Dep't)*, 1996 MERC Lab Op 84, 106, and more recently in *District Dept of Health No 2*, 20 MPER 37 (2013), we defined an executive as an employee who:

- (1) [I]s a policy making head of a major department of a public employer; or (2) in the case of employers with 1,000 or more employees, is a chief deputy to a department head, or is the head of a section or division of a major department who reports directly to a chief deputy and who exercises substantial discretion in formulating, determining, and effectuating management policy; or (3) pursuant to statutory or charter provision, exercises a substantial degree of autonomy in carrying out his or her public services and who has direct access to or direct influence upon the governing body of a public employer in a policy making role; or (4) formulates, determines and effectuates management policy on an employer-wide basis.

The most significant factors in determining whether a position is an executive are the scope of its responsibilities, the extent of its authority, and the interchangeability of its functions with other executives. *UAW v Sterling Heights*, 163 Mich App 8 (1987); *Leelanau Co & Leelanau Co Sheriff*, 24 MPER 18 (2011); *City of Ishpeming*, 25 MPER 80 (2012); *Carman-Ainsworth Cmty Schs*, 16 MPER 28 (2003). Within these categories, we consider factors such as the number of executive positions relative to the size of the organization, the extent of budget responsibilities, responsibility for preparation of departmental rules and regulations, the degree of interchangeability of functions between the employee and his or her immediate supervisor, and the degree of participation in labor relations or the formulation of collective bargaining policy. *Muskegon Co Prof Command Ass'n v Muskegon Co (Sheriff's Dep't)*, 186 Mich App 365 (1990); *Detroit v Foreman's Ass'n*, supra; *Arenac Co*, 2001 MERC Lab Op 208.

A confidential employee is one who formulates, determines, and effectuates management policy with regard to labor relations or an individual who assists in a confidential capacity to such a person. *Detroit Transportation Corp*, 29 MPER 49 (2016); *Sanilac Co*, 22 MPER 73 (2009); *City of Monroe*, 20 MPER 115 (2007); *City of Hazel Park*, 21 MPER 40 (2008); *St. Clair Co Cmty College*, 2002 MERC Lab Op 406, 408; *Riverview Cmty Sch*, 1968 MERC Lab Op 419. The Commission's longstanding policy has been to permit a public employer to designate one clerical employee as confidential and exclude that employee from the bargaining unit, so the employer may have available an employee who can directly assist in the preparation and handling of bargaining proposals during negotiations. *City of Bay City*, 1966 MERC Lab Op 271, 278-279. In *33rd Dist Court*, 19 MPER 75 (2006), we affirmed that this policy remains viable even in light of modern technology that permits executives and those responsible for labor negotiations to prepare their own correspondence and other confidential documents without the assistance of a clerical employee. We have also repeatedly held that an employer is entitled to designate one clerical employee as confidential even if it has never assigned clerical employees to perform confidential labor relations duties. *Dickinson Co Road Comm*, 1973 MERC Lab Op 745; *Carsonville-Port Sanilac Schools*, 1982 MERC Lab Op 1075; *Village of Kalkaska*, 1997 MERC Lab Op 481.

However, the confidential exclusion is not limited to clerical employees, but extends to other employees who have regular access to information that is relevant to collective bargaining and not made available to the union. *Oakland Cmty College*, 2000 MERC Lab Op 77, 79 (director of financial services); *Benton Harbor Bd of Ed*, 1967 MERC Lab Op 743 (director of budget, finance, and accounting); *Saginaw Twp Cmty Sch*, 1972 MERC Lab Op 937 (supervisor of accounting). While mere access to financial information is not a basis for excluding an individual as confidential, we have held that employees who cost out employer proposals in preparation for negotiations, including proposals that may never actually be presented to the union, are performing confidential labor relations duties if this gives them access to information about the employer's bargaining strategy. *Oakland Cmty College*; cf. *River Valley Sch Dist*, 17 MPER 39 (2004) (merely providing wage data used in costing out proposals is not a function with a critical labor relations nexus).

We conclude in this case that Meyers is not an executive under our definition of that term. First, we find that Meyers is not a "policy-making head of a major department." The record indicates that the Employer has hired contractors and outside counsel to perform some

risk management and personnel functions. With less than seventy employees, contractors providing some services, and both a city manager and deputy city manager, the Employer does not need or have a department devoted solely to personnel, human resources and labor relations matters. Meyers spends a substantial amount of her time on human resource duties, and, as an administrative employee, Meyers makes responsible day-to-day decisions that require the use of acquired knowledge and independent judgment. For example, Meyers is the Employer's contact person with outside counsel and contractors and for representatives of insurance companies and pension plans, and the conduit for providing benefit information to employees. She routinely hires seasonal and part-time laborers and participates in the hiring process for other employees. Meyers also assists the city manager in formulating human resources policies. For example, she provided valuable input into decisions made by the city manager in the area of employee benefits. However, the record does not indicate that Meyers is effectively responsible for deciding any significant aspect of the Employer's human resources or labor relations policies. We find, therefore, that Meyers also does not "formulate, determine and effectuate management policy on an employer-wide basis," within the meaning of subsection four of the *City of Detroit (Police Dept)* definition of an executive.

We also find that Moggio does not qualify as an executive under our definition of that term. Again, the Employer does not need, or have, a separate information technology department. Moggio helps formulate and enforce the Employer's information technology policy in addition to providing it with valuable technical assistance in this area. However, the aspects of technology policy over which Moggio has control – how often to reset passwords and which employee will have access to which software program – are relatively minor. In addition to his role in developing the technology budget, Moggio plays an important role in helping the Employer develop its overall budget. However, there is no indication that Moggio has any authority to make budget decisions. He also assists the city manager, finance director, mayor and city council in a variety of different ways, including making suggestions for improving Employer efficiency and doing research on various topics. Moggio has also offered advice to the city manager about the Employer's collective bargaining proposals. However, we find that Moggio, like Meyers, is not a decision-maker, but rather assists in the formulation, determination and effectuation of management policy. We conclude that neither Meyers nor Moggio meet our definition of an executive employee.

As set out above, the confidential exclusion is not limited to clerical employees, but also extends to employees who have regular access to information that is relevant to collective bargaining and not made available to the union. We agree with the Employer that Meyers has regular access to information that is relevant to collective bargaining and not made available to its unions. The record establishes that the city manager discusses ongoing negotiations with Meyers, including benefits proposals that the Employer is considering presenting at the bargaining table. She is also consulted on grievances and participates in disciplinary decisions. We agree with the Employer that Meyers should be excluded as a confidential employee.²

Farrah, the executive assistant to the city manager, has to date had little or no involvement in collective bargaining. The Commission's longstanding policy, however, has been to permit a public employer to designate one clerical employee as confidential and to

² The Employer does not assert that Moggio should be excluded as a confidential employee.

exclude that employee from the bargaining unit, so the employer may have available an employee who can directly assist in the preparation and handling of bargaining proposals during negotiations. The record also does not establish that it would be feasible to assign the preparation and handling of bargaining proposals and/or confidential communications between the city manager and its employment counsel to Meyers. We will, therefore, allow the Employer to designate the executive assistant to the city manager as a second confidential employee and to exclude that position from the bargaining unit.

In its post-hearing brief, the Employer requests that the petition be dismissed and the Petitioner be required to file a new petition with a showing of interest in an appropriate unit. We find no basis to dismiss the petition, and we will direct an election as follows.

ORDER DIRECTING ELECTION

Pursuant to the attached Direction of Election, we hereby direct an election in the bargaining unit of employees as set forth below which we find appropriate for collective bargaining within the meaning of §13 of PERA:

All full-time nonsupervisory employees of the City of Rochester not currently included in a collective bargaining unit, excluding confidential employees, executives, and supervisors.

The account technician, human resources and risk management and the executive assistant to the city manager shall be excluded from the unit as confidential employees.

The above employees shall vote whether they wish to be represented for purposes of collective bargaining by the Rochester Public Employees Association.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: May 13, 2016