

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. CU-003-14 and CC-002-14

(PETITION FOR CERTIFICATION WITHOUT AN ELECTION)

GROUP OF UNREPRESENTED)	
BATTALION CHIEFS EMPLOYED)	
BY THE CITY OF MEDFORD,)	
)	
Petitioner,)	
)	
v.)	
)	
CITY OF MEDFORD,)	RULINGS,
)	FINDINGS OF FACT,
Respondent.)	CONCLUSIONS OF LAW,
)	AND ORDER
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INTERNATIONAL ASSOCIATION OF)	
FIRE FIGHTERS, LOCAL 1431,)	
)	
Petitioner,)	
)	
v.)	
)	
CITY OF MEDFORD,)	
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Respondent.)	
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On October 2, 2014, the Board heard oral argument on the City of Medford's objections to a recommended order¹ issued by Administrative Law Judge (ALJ) Larry L. Witherell on July 31, 2014, after a hearing held on April 21, 2014, in Medford, Oregon. The record closed on May 6, 2014, following receipt of the parties' post-hearing briefs.

¹After this Board received objections to the recommended order, the Oregon Public Employer Labor Relations Association and the Oregon State Fire Fighters Council applied to appear as *amicus curiae*. We granted both applications and both *amici* submitted briefs, which we considered in reaching our decision.

Michael J. Tedesco and Julie Falender, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented the Group of Unrepresented Battalion Chiefs Employed by the City of Medford and the International Association of Fire Fighters, Local 1431.

Dian Rubanoff, Attorney at Law, Peck Rubanoff & Hatfield, PC, Lake Oswego, Oregon, represented the City of Medford.

On March 10, 2014, the Group of Unrepresented Battalion Chiefs Employed by the City of Medford (City) filed a petition in Case No. CU-003-14 seeking to be added to an existing bargaining unit without an election under ORS 243.682(2)(a) and OAR 115-025-0000(1)(c). The petitioners seek representation by the International Association of Fire Fighters, Local 1431 (Union), and propose to add Fire Battalion Chiefs, Fire Battalion Chief/Fire Marshal and Fire Battalion Chief of Training and Safety to the existing bargaining unit, resulting in a new bargaining unit comprised of

all regular employees of the Medford Fire Department in the Firefighter, Fire Inspector, Fire Engineer, and Fire Captain classifications, and all Fire Battalion Chief classifications, including Fire Battalion Chiefs, Fire Battalion/Fire Marshal, and Fire Battalion Chief of Training and Safety; excluding supervisors, confidential, and temporary employees.

The City filed three timely objections to the petition in Case No. CU-003-14:

(1) The City first objected that the Battalion Chiefs are supervisors as defined by ORS 243.650(23) and confidential employees as defined by ORS 243.650(6).

(2) Secondly, the City objected that the petition should be designated as a unit clarification petition under OAR 115-025-0005(2) because the issues include (a) public employee status under ORS 243.650(6) and (23); (b) whether the positions are or are not included by terms of the collective bargaining agreement; and (c) whether the petition is untimely because it purportedly should have been filed during the open period under OAR 115-025-0015(4).

(3) Lastly, the City claimed that the Petitioner must demonstrate a showing of interest of more than 50 percent of all employees in the proposed bargaining unit under ORS 243.682(2)(a) and *Coalition of Graduate Employees, Local 6069, AFT, v. Oregon University System, Oregon State University*, Case No. UC-04-12, 25 PECBR 356 (2013).

Also on March 10, 2014, the Union filed the petition in Case No. CC-002-14 seeking certification without an election under ORS 243.682 and OAR 115-025-0000(1)(c). The petition proposes the formation of a new bargaining unit comprised of

all regular employees of the Medford Fire Department in the Fire Battalion Chief classification, including the Fire Battalion Chiefs, Fire Battalion/Fire Marshal, and

Fire Battalion Chief of Training and Safety; excluding all Firefighter, Fire Inspector, Fire Engineer, and Fire Captain classifications, supervisors, confidential, and temporary employees.

The City filed three timely objections to the petition in Case No. CC-002-14:

(1) First, the City objected that the Battalion Chiefs are supervisors as defined by ORS 243.650(23) and confidential employees as defined by ORS 243.650(6).

(2) Secondly, the City objected that the petition should be designated as a unit clarification petition under OAR 115-025-0005(2) because of the “public employee status.”

(3) Lastly, the City objects that the proposed unit is not an appropriate unit because the employees would have a community of interest with other non-supervisory fire department employees represented by the Association.

The issues in Case No. CC-002-14 are:

1. Are the Fire Battalion Chiefs, Fire Battalion Chief/Fire Marshal, and Fire Battalion Chief of Training and Safety supervisors within the meaning of ORS 243.650(23)(b)?

2. Are the Fire Battalion Chiefs, Fire Battalion Chief/Fire Marshal, and Fire Battalion Chief of Training and Safety confidential employees within the meaning of ORS 243.650(6)?

3. Is a bargaining unit limited to all employees in the Fire Battalion Chief classification, including the Fire Battalion Chiefs, Fire Battalion Chief/Fire Marshal, and Fire Battalion Chief of Training and Safety, an appropriate bargaining unit?

The issues in Case No. CU-003-14 are:

1. Are the Fire Battalion Chiefs, Fire Battalion Chief/Fire Marshal, and Fire Battalion Chief of Training and Safety supervisors within the meaning of ORS 243.650(23)(b)?

2. Are the Fire Battalion Chiefs, Fire Battalion Chief/Fire Marshal, and Fire Battalion Chief of Training and Safety confidential employees within the meaning of ORS 243.650(6)?

For the reasons discussed below, in Case No. CC-002-14, we hold that the battalion chiefs are neither supervisory nor confidential employees and that the proposed bargaining unit is an appropriate unit. We will dismiss the petition in Case No. CU-003-14.²

RULINGS

On April 15, 2014, the ALJ issued an order consolidating Case Nos. CU-003-14 and CC-002-14 for hearing. The cases were heard on April 21. With the issuance of the recommended

²Because we have determined that the unit in CC-002-14 is an appropriate bargaining unit under ORS 243.682(1), we need not address the petition in Case No. CU-003-14.

decision and order, the ALJ ordered, *sua sponte*, that the cases be consolidated for decision. We agree with that ruling and also treat these cases as consolidated for purposes of this order.

The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties and Organization

1. The Union is a labor organization within the meaning of ORS 243.650(13).
2. The City is a public employer within the meaning of ORS 243.650(20).
3. The Union and the City are parties to a collective bargaining agreement that is effective from July 1, 2013 to June 30, 2016. The bargaining unit consists of all fire captains, fire engineers, fire inspectors, and firefighters employed by the City; excluding supervisory, confidential, and temporary employees.
4. In addition to the Union, the City has collective bargaining agreements with three other labor organizations, covering six separate bargaining units. Those units are represented by: the Medford Police Officers Association (effective from July 1, 2012 to June 30, 2015); Teamsters Local Union No. 223, representing Medford municipal mechanics (effective July 1, 2012 to June 30, 2014); Teamsters Local Union No. 223, representing operators (effective July 1, 2011 to June 30, 2014); Teamsters Local Union No. 223, representing construction and maintenance employees (effective July 1, 2012 to June 30, 2014); Teamsters Local Union No. 223, representing Medford park employees (effective July 1, 2012 to June 30, 2014); and AFSCME Local 2621, Council 75, AFL-CIO, representing Medford municipal employees (effective July 1, 2012 to June 30, 2014).
5. This case concerns the status of the battalion chiefs (BC) in the City's fire department. At the time of this hearing the following individuals were BCs:

Brian Fish	BC for Training and Safety, 1997-2007; Shift BC, 2007-2014; promoted to Deputy Chief of Operations in April 2014
Ken Goodson	Shift BC since August 1995
Greg Kleinberg	Fire Marshal BC since June 2008
Tom McGowan	BC for Training and Safety since October 2013
Erin Sawall	Shift BC since November 2011
6. The City's fire department is a chain-of-command organization. The City operates five fire stations. The City's fire department is currently headed by an interim fire chief. Two deputy chiefs report to the fire chief. Deputy Chief Gordon Sletmoe is responsible for administration.³ Deputy Chief Justin Bates is responsible for operations.

³At the time of the hearing, Deputy Chief Sletmoe was scheduled to leave the City and take a position in another jurisdiction. He has been replaced by Deputy Chief of Operations Bates. BC Fish was being promoted to the position of deputy chief of operations at the time of the hearing.

7. Deputy Chief Sletmoe is supported by Office Administrator Pam Webber and five office employees. Fire Marshal BC Kleinberg reports to the deputy chief of administration.

8. The City runs three 24-hour shifts. BC Goodson is responsible for A shift; BC Sawall is responsible for B shift; and BC Fish is responsible for C shift. BC McGowan is responsible for training and not responsible for a particular shift. The Shift BCs report to Deputy Chief Bates.

9. On their shifts, the shift BCs monitor and respond to calls and are responsible for assigning individuals to one of the five stations and to where they will work within the particular station. The City has set the number of employees to cover a station and shift. Both A shift and C shift are supported by 5 captains, 5 engineers, and 12 firefighters, and they report to the BC for the particular shift. B shift is supported by 5 captains, 5 engineers, and 11 firefighters.

10. Four fire inspectors report to BC Fire Marshal Kleinberg.

11. BC Fire Marshal Kleinberg and BC for Training McGowan work 40 hours per week. BC Goodson, BC Sawall, and BC Fish average 56 hours per week.

12. The captains are each responsible for an engine company (composed of the captain, fire engineer, and firefighters) and the fire station during the 24-hour shift. They are responsible for crew continuity and safety and support the career development of members of the crew. The captains also oversee the crew's training, and assist the BC in the evaluation of crew members. They are responsible for strategy and tactics of the emergency team, and for the maintenance of the fire and station equipment. The captains respond to public or customer complaints. Each captain is in close communication and coordination with the BC and the other captains.

13. Fire Inspectors I are responsible for performing code compliance inspections, fire cause and arson investigations, and safety education programs. Fire Inspectors II and III conduct code and ordinance inspection for educational, commercial, industrial, and residential properties; conduct fire inspections and cause determinations; conduct safety programs, classes, and demonstrations; and review fire and life safety plans for code compliance.

14. The BCs, firefighters, fire inspectors, fire captains, and fire engineers have very similar and comparable benefits under the City benefit plans and the collective bargaining agreement. They have similar skill sets, training background, and training requirements. Firefighters, engineers, and fire inspectors are eligible for promotion to captain. Captains are eligible for promotion to a BC position.

15. The BCs work together with many of the same occupational and professional duties, responsibilities, and objectives; they enjoy the same city employment benefits and salary schedules; they report to the same supervisors and have the same location in the chain of command; they possess the same skill sets and receive common training; they can transfer among themselves; and they have the same promotional opportunities.

Duties and Responsibilities: City “Rules and Regulations”

16. The City maintains “Rules and Regulations for Executive, Supervisory, and Confidential-Professional Employees.” The most recent set is January 1, 2014, and covers nearly 80 executive, supervisory and confidential-professional classifications, including the fire chief, deputy fire chief, and fire battalion chief.

17. The Rules and Regulations are given to an individual when promoted to or made a BC. Elizabeth Simas, Human Resource Analyst, provides the executive, supervisory and professional employees with a copy of the Rules and Regulations and goes over the Rules and Regulations with the employees. Section 4 (Authority) of Article V (Discipline and Discharge) sets out provisions for authority to carry out discipline.

“A. All Executive, Supervisory, and Professional personnel are empowered to give oral and written warnings, written reprimands, and suspensions, without pay for no more than five (5) work shifts, without higher level prior approval to their assigned subordinate personnel.[⁴]

“B. Suspensions without pay of up to ten (10) work shifts may be given, without higher level prior approval, to subordinate personnel by Executive personnel. Personnel below this level may effectively recommend suspensions without pay of up to ten (10) work shifts.

“C. The City Manager may give suspensions without pay for an appropriate duration. Executive personnel may effectively recommend suspensions without pay of more than ten (10) work shifts relative to their subordinate personnel.

“D. Demotion and discharge actions are retained as a prerogative of the City Manager. However, all other Executive, Supervisory, and Confidential-Professional personnel may effectively recommend such discipline relative to their subordinate personnel.” (Underline in original.)

18. Each executive, supervisory, and confidential-professional signs an “acknowledgement of receipt” that states:

“This is to acknowledge that I have received a copy of the Rules and Regulations effective [date of signature].

“These Rules and Regulations supersede all previous statements, memos, policies, and practices that are in conflict with their provisions.

⁴The language in Article V, Section 4(A), has been in the Rules and Regulations in this form since 1995. Notwithstanding the language of subsection (A), BCs cannot independently impose such economic discipline. Rather, the deputy chief and human resources department needed to vet any BC-imposed discipline.

“I understand these Rules and Regulations contain important information on the City’s general personnel policies and rules and my privileges and obligations as an employee.

“I will familiarize myself with the materials in the Rules and Regulations and understand that I am governed by their contents.

“I further understand that the City may change, rescind, or add to any policies, benefits, or practices described in the Rules and Regulations with the notice prescribed in these Rules and applicable Medford Code provisions.”

BC Goodson signed acknowledgements on August 21, 1995 and August 10, 1999; BC Kleinberg on August 2, 2010; BC Sawall on November 30, 2011; and BC McGowan on October 9, 2013. Former BC Fish signed on September 22, 1997, August 23, 1999, and July 22, 2010.

Duties and Responsibilities: Existing Job Descriptions

19. The job description for the Shift BC was most recently revised in September 2004. The typical essential duties specified in the 2004 job description, including their frequency, are as follows:

- “1. Supervises lower level employees classified as Firefighter, Fire Engineer, and Fire Captain, to include: distributing work assignments; creating and maintaining shift rosters; providing guidance and training; conducting performance evaluations; and, scheduling staff related matters. [Daily 40%]
- “2. Responds to emergency incidents, which includes: directing fire companies to mitigate the emergency; driving shift commander vehicle code III; operating shift command vehicle on scene; performing manual skills at emergency scenes; investigating or participating in the investigation of fire causes; directing the restoration of employees and equipment to ready status following emergencies; and, performing other related tasks. [Daily 10%]
- “3. Ensures that fire companies are prepared to perform at emergency incidents by instructing, assigning instructors, and planning and scheduling training. [Daily 10%]
- “4. Facilitates meetings with fire companies; attends staff meetings; participates in meetings with management and outside agencies. [Daily 10%]
- “5. Oversees the care and maintenance of apparatus and equipment. [Daily 10%]

- “6. Prepares a variety of reports, logs, and other related documentation. [Daily 5%]
- “7. Plans and organizes specialized programs as assigned. [Daily 5%]
- ”8. Participates in assessment center evaluations; assists in the development of promotional materials and written examinations; may conduct background investigations. [Bi-Annually 5%]
- “9. May participate in union negotiations, mediations, and/or arbitrations. [Varies 0-5%]
- “10. Performs other duties of a similar nature or level. [As required.]”

20. The BC fire marshal is responsible for “enforcing the fire code, related enforcement programs, administering fire inspection programs, fire investigations, fire and life safety public education programs, and pre-construction plan reviews for code compliance.” The BC fire marshal is also “responsible for employee training and development, performance evaluation and discipline, succession planning, and performing routine analysis of the [Fire Prevention] Bureau to insure operational efficiency.” The October 2009 job description provides the following typical essential duties for the BC fire marshal as follows:

- “1. Under the direct supervision of the Deputy Fire Chief, the Fire Marshal supervises and coordinates the fire prevention and inspection activities of the fire department, including fire and life safety prevention, inspections, and public education programs. [Daily 40%]
- “2. Manages fire investigation activities, processes evidence, preparing routine incident and Bureau activity reports, and managing activities related to amending and adopting the fire code. Exercises considerable independent judgment in the management and operation of the Bureau. [Daily 10%]
- “3. Responsible for the management of hazardous materials programs, fire cause and arson determination, testifying as an expert and legal witness in matters related to arson cause, and management of pre-construction plan checks for compliance with fire codes. [As Required 5%]
- “4. Exercises direct supervision, trains, and evaluates assigned staff, prepares and administers a bi-annual budget, inspect buildings and facilities; assist in the development and implementation of policies, goals, objectives, and priorities; develops and implement procedures and practices for providing public fire and life safety education, coordinates the activities of the Bureau in accordance with department-wide policies and goals, makes presentations before the City Council, Board of Directors, meets with architects, engineers, contractors, consultants involved in development and

construction activities, coordinates line personnel inspections, and conducts field inspections of construction projects. [Daily 40%]

“5. Assist with labor/management relations activities, respond as a command officer to emergency incidents and is subject to emergency call when off duty. [As Required 5%].”

21. The BC for Training and Safety is responsible for managing the training for the emergency medical services program. The 2012 job description for the position lists the typical essential duties as follows:

- “● Planning, organization, implementation, and evaluation of the Fire Department’s training programs for all personnel including Operations, Fire and Life Safety, and Administration Divisions.
- “● Development and oversight of the Fire Department’s succession plan.
- “● Administration of fire accreditation with Oregon Department of Public Safety Standards and Training (DPSST) and EMS certification with the Oregon Health Division.
- “● Development and administration of the training department budget; oversees the maintenance and development of all training equipment and facilities.
- “● Development of goals and objectives for the training and safety programs that are consistent with the organizational goals; routinely reports progress on those goals and objectives.
- “● Oversight of hiring and promotions for the Fire Department, including coordinating with the Human Resources Department and background investigations for new hires.
- “● Serves as the Fire Department Safety Officer including representing management on the Safety Committee and conducting injury / illness investigations.
- “● Participation in local, regional, and state training activities and committees.”

Disputed Changes to BC Job Descriptions (February-April 2014)

22. Senate Bill 1518 (SB 1518) was introduced in the 2014 legislative session.⁵ As early as February 4, 2014, the City was actively engaged in opposition to passage of SB 1518, and

⁵“An Act Relating to supervisory employees under collective bargaining law; creating new provisions; amending ORS 243.650; and declaring an emergency.”

closely monitored the process of SB 1518 at the legislature. SB 1518 passed the Senate on February 14 and the House on February 21. The Governor signed the bill on March 3, 2014. *See* Or Laws 2014, ch 15, § 1. There was coordination between the City and other Oregon cities and the Oregon Fire Chiefs Association (OFCA) to express opposition to SB 1518. After the bill’s passage, there was coordination between the City, other cities, and the OFCA about how to respond to unit clarification cases before this Board.

23. Michael Snyder became the human resources director for the City in December 2013. Snyder became aware that the legislature was considering, and eventually passed, SB 1518. On February 24, 2014, Snyder made inquiries into the status of SB 1518, and on the morning of February 25, he was informed that the bill was awaiting the governor’s signature. The legislative change in the definition of supervisory status as it would apply to the BCs contributed to his action in adjusting the job descriptions for the BCs. The City was concerned that the effect of the legislation would be to remove the BCs from management, and, as a result, Snyder proceeded to update the BCs’ job descriptions.

24. On February 25, 2014, after receiving the update on SB 1518, Snyder e-mailed Deputy Chief Bates and Deputy Chief Sletmoe that he was “updating the managerial job descriptions to clarify responsibilities as they relate to discipline and collective bargaining.” He asked them to review the three BC job descriptions and suggest anything that needed to be added or removed. Snyder modified the job descriptions by adding the following as a typical essential duty for the BCs:

“Assist with labor/management relations activities which include, but is not exclusive of:

- “● Exercising independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline;*
- “● Participating in internal investigations of subordinates;*
- “● Interpreting and administering the collective bargaining agreement;*
- “● The formulation, determination and effectuation of management policies regarding collective bargaining.” (Underline omitted.)*

25. At a command staff meeting held on March 3, 2014, the BCs first learned that the City intended to change their job descriptions.⁶ The BCs were also told that Snyder would be meeting with them about the changes.

26. On March 7, 2014, Snyder e-mailed the BCs, informing them that he was working on a project to update the classifications throughout the City. He wanted the BCs to know that the process to review and revise their job descriptions and duties was proceeding quickly because the new legislation affected their supervisory status. The City was concerned that people would see the new legislation as removing the BCs from the City’s management team. Accordingly, Snyder claimed to want to create “clarity” with respect to their duties and responsibilities by revising the job descriptions.⁷

⁶BC Goodson, however, learned that Snyder was working on the job descriptions on February 28, 2014, when Snyder contacted Goodson with a question about his current job description.

He explained to the BCs that their job descriptions

“popped to the surface because of the need for the City to create clarity in light of a change that was being proposed in the Oregon Legislature.

“Over the past several weeks, I have worked closely with the Deputy Chiefs to gather an understanding of the BC job duties and responsibilities. Based on this I have updated your job descriptions to make them current and create clarity with respect to your primary job duties and the level of responsibility as it relates to collective bargaining and disciplinary matters. The next step in this process is for me to get feedback from you regarding your specific job description before we finalize the document. I will be contacting you soon to discuss HR’s work on your job descriptions and receive feedback. * * * I will be scheduling a meeting with each of you, while on shift, to have a personal discussion regarding the process and receive your feedback.”

Snyder conceded in his e-mail to the BCs that “the Union disagrees with the City having contact with you. My contact with you on this issue is merely due to course of business and necessary for me to effectively continue the HR function for the City.” He told the BCs that he was aware that they had all signed Union representation or authorization cards. He stated that there was no need for the BCs “to be put in the middle of the disagreement between the Union and the City regarding representation issues when we are discussing internal issues of this nature.”

Snyder attached a copy of the job description that he had drafted to his e-mail. He asked the BCs to review the document so that he could gain their feedback when they met.

27. Snyder changed the typical essential duties for the Shift BC to read as follows:

- “1. Manages and supervises lower level employees classified as Firefighter, Fire Engineer, and Fire Captain, to include: distributing work assignments; creating and maintaining shift rosters; providing guidance and training; conducting performance evaluations; and, scheduling staff related matters;
- “2. Responds to emergency incidents, which includes: directing fire companies to mitigate the emergency; driving shift commander vehicle; operating shift command vehicle on scene; performing manual skills at emergency scenes; investigating or participating in the investigation of fire causes; directing the restoration of employees and equipment to ready status following emergencies; and, performing other related tasks;
- “3. Ensures that fire companies are prepared to perform at emergency incidents by instructing, assigning instructors, and planning and scheduling training;

⁷Snyder consistently employed the term “clarity” when describing the purpose of changing the BC job descriptions. Likewise, as discussed below, the City asserted at oral argument that the updated job descriptions were intended to “clarify” the longstanding authority of BCs.

- “4. Facilitates meetings with fire companies; attends staff meetings; participates in meetings with management and outside agencies;
- “5. Oversees the care and maintenance of apparatus and equipment;
- “6. Prepares a variety of reports, logs, and other related documentation;
- “7. Plans and organizes specialized programs as assigned;
- “8. *Assist with labor/management relations activities which include, but is not exclusive of:*
 - “● *Exercising independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline;*
 - “● *Participating in internal investigations of subordinates;*
 - “● *Interpreting and administering the collective bargaining agreement;*
 - “● *The formulation, determination and effectuation of management policies regarding collective bargaining;*
- “9. Participates in assessment center evaluations; assists in the development of promotional materials and written examinations; may conduct background investigations;
- “10. Performs other duties of a similar nature or level.” (Italics added.)

28. Snyder changed the list of typical essential duties for the BC for training and safety to read as follows:

- “1. Planning, organization, implementation, and evaluation of the Fire Department training programs for all personnel including Operations, Fire and Life Safety, and Administration Divisions;
- “2. Development and oversight of the Fire Department’s succession plan including the development and monitoring of training programs for probationary Firefighters;
- “3. Administration of fire accreditation with Oregon Department of Public Safety Standards and Training (DPSST) and EMS certification with the Oregon Health Division;
- “4. Administration of fire accreditation with Oregon Department of Public Safety Standards and Training (DPSST) and EMS certification with the Oregon Health Division;

- “5. The Battalion Chief-Training and Safety functions as a Department Duty Officer on a rotating basis and may function as a command officer at emergency scenes;
- “6. Development of goals and objectives for the training and safety programs that are consistent with the organizational goals; routinely reports progress on those goals and objectives;
- “7. Oversight of hiring and promotions for the Fire Department, including coordinating with the Human Resources Department and background investigations for new hires;
- “8. Serves as the Fire Department Safety Officer including representing management on the Safety Committee and conducting injury / illness investigations;
- “9. Participation in local, regional, and state training activities and committees;
- “10. Will be responsible for Fire Battalion Chief shift duties as required;
- “11. *Assist with labor/management relations activities which include, but is not exclusive of:*
 - “● *Exercising independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline;*
 - “● *Participating in internal investigations of subordinates;*
 - “● *Interpreting and administering the collective bargaining agreement;*
 - “● *The formulation, determination and effectuation of management policies regarding collective bargaining;*”
- “12. Regular, reliable and punctual attendance.” (Italics added.)

29. Snyder changed the list of typical essential duties for the BC fire marshal by inserting the following as a replacement for item 5:⁸

- “5. *Assist with labor/management relations activities which include, but is not exclusive of:*
 - “● *Exercising independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline;*
 - “● *Participating in internal investigations of subordinates;*
 - “● *Interpreting and administering the collective bargaining agreement;*
 - “● *The formulation, determination and effectuation of management policies regarding collective bargaining;*” (Id. at 2; italics added.)

⁸See above, No. 5 in Findings of Fact 18.

30. On an unknown date, but probably in early March 2014, Snyder had a conversation about the process of changing the BC job descriptions with Bryan Baumgartner, president of the Union. However, shortly after that conversation, on March 4, 2014, Baumgartner informed Snyder in writing that the Union

“has become aware of recent efforts by the League of Oregon Cities encouraging cities in the state of Oregon to modify fire department supervisory employee policy that may [a]ffect the current Battalion Chief job description. It appears this has been initiated since the recent passage of Senate Bill 1518[.] * * * We would point out that such a policy change is unnecessary and unwise from an operational point of view and would merely be a very transparent attempt to circumvent the implications of SB 1518.”

Snyder and Baumgartner met later that same day. Snyder explained that since he was hired he had been reviewing all the City’s human resources policies. He further explained that he had discussed the Union’s organizing efforts with the city manager and that the City would be objecting to the Union’s efforts to organize the BCs.

31. On March 6, 2014, Baumgartner informed Snyder that the Union had received five card-check authorization cards from the BCs, and that the Union would be filing a petition with this Board. Baumgartner stated that the Union considered it inappropriate for the City to discuss job duties and descriptions with the BCs. Snyder responded that the “City disagrees with the notion that the [BCs] are covered under the [Public Employee Collective Bargaining Act (PECBA)] and will continue business as usual in that regard.” These same positions were reiterated by Baumgartner and Snyder on March 7.

BCs’ Comments on Disputed New Job Descriptions

32. During the process of changing the BC job descriptions, Snyder met individually with each BC. Snyder met with Shift BC Goodson on March 11, 2014. Snyder told Goodson that he was pleased that the BCs “were all unified in the card count.” Snyder explained that the job descriptions were being clarified. He also mentioned that the legislature had just changed the law concerning the BCs; that he did not agree with the new law; and that some of the changes in the job description were because of the new law. Goodson told Snyder that he has given oral and written reprimands but has never given any economic discipline. Snyder also brought up the issue of salary compression, and stated that the City had a solution in place for the problem. Snyder gave Goodson a copy of the proposed job description and asked for his comments.⁹

33. Snyder met with BC Fire Marshal Kleinberg on March 6, 2014. Snyder began by acknowledging the card check process being undertaken by the Union, and then added that the City was updating the BC job descriptions. Snyder gave Kleinberg a draft revision of the Fire Marshal BC job description and asked him to review it and get back to him with any issues.

⁹Salary compression developed when newly hired employees (firefighters) received a starting salary that was at or above the salary of more senior and superior incumbent employees (BCs).

On March 13, 2014, Kleinberg provided Snyder with a detailed response to the proposed job description. Kleinberg stated he was uncomfortable with some of the language, particularly with respect to disciplinary authority added by Snyder. Kleinberg wrote that

- “● I have been involved in giving oral and written reprimands, however, never imposed economic discipline and believe it would be at the level of Deputy Chief or above to make this decision and implement it. All disciplinary action is expected to have the authorization and direction of the Deputy Chief or above prior to taking action. Implementing disciplinary measures have never been an independent action.
- “● I have not been given the task of performing internal investigations. This has traditionally been directed at the level of the Deputy Chief or above having a 3rd party conduct it.
- “● I have not conducted formulation, determination, etc. of policies regarding collective bargaining. I have been asked for input and opinion, however I believe these have always been carried out by HR, the Fire Chief, and the Deputy Chiefs.”

34. On March 7, 2014, Snyder met with Shift BC Sawall and advised him that a BC would be subject to corrective action, including possible discipline, for failing to impose discipline on another employee when the City considered discipline to be appropriate.

35. During their meetings with Snyder, the BCs emphasized to Snyder that they had never imposed economic discipline and considered it to be a bad idea to do so.

36. In March 2014, after meeting with Snyder, BC Fish, BC Sawall, and BC Goodson wrote to Snyder to say that they opposed being given authority and responsibility for imposing economic discipline. With respect to No. 3 (in Findings of Fact 27) concerning training, they pointed out that “[m]ost of the training is coordinated by the Training Chief and Training Committee. Battalion Chiefs do not assign instructors, plan or schedule that much training anymore. We facilitate and occasionally instruct training.” With respect to the discipline provision, No. 8, they stated:

“So much of our leadership is built on the ability to have casual/informal discussions with our shift members. Many of these conversations have led to corrections in actions way before any type of discipline was needed. There is a great amount of **Trust** built into our relationships making strong bonds. Having the ability to ‘issue’ disciplinary action which includes ‘economic discipline’ would erode much of what we have worked so hard to build up.

- “● We do not engage in economic discipline and we do not feel we should have to implement that level of discipline.
- “● We do not direct internal investigations; we may give input as directed by the Fire Chief or Deputy Chiefs.

- “● We are not exactly sure what is meant by the [fourth] bullet point.^[10] Collective bargaining is directed and led by the Human Resource Director at the discretion of the City Manager and the City Council. The Fire Chief gives direct input into the process. The Battalion Chiefs may submit suggestions to the Fire Chief.”

Goodson also disagreed with Snyder’s changes in the job description, which suggested that the BCs conduct assessment or examinations of employees or candidates. “The ‘testing’ and ‘examination’ activity,” Goodson wrote, “has historically been conducted by the Training Division, with very minimal help/input from the [BCs] (with the exception of the Captain’s Exam—have more involvement at this level). We have participated as facilitators in hiring and promotional processes.”

37. Training BC McGowan met with Snyder in early March 2014, and very soon thereafter, he sent his comments and suggestions to Snyder. McGowan suggested changing No. 11, which concerned Snyder’s proposed supervisory and confidential responsibilities. (See Findings of Fact 28.)

McGowan disagreed with Snyder’s suggestion that the BCs can independently impose economic discipline. McGowan understood that recommendations would be made to a deputy chief or to the fire chief, and they would impose discipline if they agreed with the recommendation. It was not his understanding that BCs could ever independently impose economic discipline. He wrote to Snyder, “[I]ine Battalion Chiefs do not have the authority to implement economic discipline. We make recommendations to the Operations [Deputy] Chief for disciplinary purposes.” Accordingly, he struck out the disputed line from Snyder’s proposed changes: ~~“Exercising independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline[.]”~~ (Emphasis in original.)

McGowan also disagreed with the idea that BCs participated in the formulation of collective bargaining policies and strategies. He said, “I do not see this being a role of a Battalion Chief. I do not formulate Management Policies.” He, therefore, struck out ~~“The formulation, determination and effectuation of management policies regarding collective bargaining[.]”~~ (Emphasis in original.)

38. The interim fire chief held a meeting with the BCs on March 17, 2014. Snyder, Pam Webber, the administrative assistant for the fire department, BC Goodson, and BC Sawall were physically in attendance. BC Kleinberg was present via cell phone connection because he was at a conference in Reno. BC Fish and BC McGowan were out of town and unable to participate.

Snyder explained that the City objected to the Union’s petition, and that there would be a hearing. Snyder discussed how economic discipline would be administered by the BCs. The BCs expressed disagreement with Snyder’s announcement. The City officials also discussed the salary compression, and that the City was opposed to a labor organization representing the BCs.

¹⁰“The formulation, determination and effectuation of management policies regarding collective bargaining.”

39. During this period, perhaps in late March 2014, Deputy Chief Bates discussed Snyder's proposed job descriptions with Shift BC Fish. Fish suggested that the job description use only the term "recommend" in association with economic discipline, and remove the term "impose" as it applied to economic discipline. However, thereafter, on April 2, 2014, Bates sent an e-mail to Snyder, in which Bates stated that he believed that the job description "should keep both 'impose **and** recommend' discipline." (Bold and italics in original.)

40. On April 2, 2014, Snyder wrote to Deputy Chief Bates and BC Fish about the updated job descriptions. Snyder acknowledged that the BCs disagreed with the inclusion of the economic discipline language. However, he stated that it is clear that the City wants the BCs and the deputy chiefs to have that authority. Snyder also emphasized that

"[t]he clear expectation here is that the BCs and [deputy chiefs] will **assist** in a confidential capacity to management staff and Human Resources in the formulation, determination and effectuation of management policies regarding collective bargaining (**assist** is the operative word here). The BCs, in particular, are important advisors when it comes to operational issues and administration of the contract." (Bold in original.)

41. On April 3, 2014, Snyder sent the final version of the job descriptions to the city manager for approval and enactment. The job descriptions were approved and became effective on April 3. The final version of the job description for the Shift BCs and the Training BC included the statements that the BCs

"Exercise[] independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline.

"Assist with labor/management relations activities which include, but is not exclusive of:

- "● Participating in internal investigations of subordinates;
- "● Interpreting and administering the collective bargaining agreement;
- "● Assisting in a confidential capacity to management staff and Human Resources in the formulation, determination and effectuation of management policies regarding collective bargaining."

The job description for the Fire Marshal BC stated that the incumbent "[e]xercises direct supervision over Fire & Life Safety Division staff, including:

- "○ Training;
- "○ Evaluation;
- "○ Exercising independent judgment to issue or recommend disciplinary action, to include the imposition of economic discipline;
- "○ Assignments."

As with the other two BC classifications, the Fire Marshal BC was also expected to "[a]ssist with labor/management relations activities which include, but is not exclusive of:

- “● Participating in internal investigations of subordinates;
- “● Interpreting and administering the collective bargaining agreement;
- “● Assisting in a confidential capacity to management staff and Human Resources in the formulation, determination and effectuation of management policies regarding collective bargaining[.]”

42. The City did not give the newly approved job descriptions to the BCs. In fact, by the date of the hearing, the BCs still had not been given or seen copies of newly approved and changed job descriptions.

Exercise of Purported Supervisory and Confidential Responsibilities

43. There are five stations with five station captains. The BC is only at one station. As a result, the captains at the four stations without a BC act as a supervisor of their crews and stations. Each captain is responsible for ensuring that the station operates effectively and properly. The BC is the supervisor of the shift when the deputy chief of operations and the fire chief are not on duty, that is, during the evening and night hours. The BC is responsible for ensuring that the crews and stations on the assigned shift operate effectively and properly. During the evening, night, and weekend hours, there is always an on-call duty officer available for the BC to consult. One of the deputy chiefs, the fire chief, and the BC for training may serve as the duty officer. The fire chief, the chief of operations, and the training chief from the Douglas County fire department (Fire District 3) can also be available to serve as an on-call duty officer.¹¹

Hiring and Promotions

44. The fire chief has the ultimate authority and responsibility for hiring and promotion decisions. However, the fire chief regularly asks BCs for recommendations or assessments when the City considers hiring new firefighters or when promoting firefighters. BC recommendations, which are one of many, are followed a majority of the time. Recommendations are also solicited from captains and engineers when the chief is considering certain promotions. BC Fire Marshal Kleinberg, Training BC McGowan, and Shift BCs Goodson and Fish have never made the decision to hire a firefighter or other employee.¹²

45. The BCs routinely have been asked to participate in the hiring assessment process for applicants and new employees. The hiring process is generally conducted or managed by the training division, under the direction of the Training BC. The department has developed and followed a practice that aims to include many levels of personnel in the hiring process. Bargaining unit employees, such as firefighters, and non-firefighting personnel may also participate in the assessment process and make recommendations on applicants or candidates. Based on examinations and interviews, the total applicant pool is reduced to a handful of candidates. This

¹¹The current interim fire chief does not serve as a duty officer because he is a civilian with minimal fire service experience. However, when a regular fire chief holds the position, the incumbent would normally serve as on-call duty officer.

¹²Shift BC Sawall did not testify at the hearing.

smaller pool of candidates, most recently seven applicants, is forwarded for interviews that are usually conducted by the fire chief and the deputy chiefs. The fire chief makes the final decision and offer of employment to an applicant.

In the most recent hiring round, the interim fire chief wanted a backup pool of candidates to consider. He instructed three BCs to interview the next eight candidates, who were all very close in scores and ranking, and then recommend two to four finalists to be forwarded for consideration by the interim chief. The BCs narrowed the eight applicants to five finalists, and forwarded their names to the interim chief for consideration.

46. A process similar to the hiring process is conducted for the promotion of employees, except that firefighters will not participate in the assessment process where firefighters will be applying for promotion to engineer or captain. Similarly, captains will not serve on the assessment process where captains are seeking promotion to a BC position. The chief follows the recommendations for promotions a majority of the time.

Disciplinary Action

47. The current BCs have not independently imposed economic discipline. Even under the job descriptions approved and enacted on April 3, 2014, BCs would not independently impose or administer economic discipline without some involvement of others such as the human resources department, fire chief, or deputy chiefs. It would be incumbent upon a BC to consult with the human resources department, the appropriate deputy chief, and even the fire chief.

48. BC Fire Marshal Kleinberg has never independently imposed a termination, suspension, or other economic discipline. Those decisions have been made by the deputy chief and the fire chief.

On one occasion in 2009, a fire inspector failed to complete fire investigation reports. BC Kleinberg gave the fire inspector oral and written reprimands. Kleinberg, however, consulted closely with the deputy chief concerning the reprimands. The deputy chief gave approval for the reprimands, and was even consulted over and approved the language of the written reprimand. When the fire inspector failed to complete the reports, Kleinberg recommended to the deputy chief that the inspector be given a one-day suspension without pay. The deputy chief, who was kept fully informed of the employees' performance and the prior disciplinary actions, accepted the recommendation. The deputy chief suspended the fire inspector.

A second fire inspector was suspended and terminated in 2009, but that case was handled completely by the deputy chief, and did not involve Kleinberg's input, recommendation, or participation.

49. As a BC, Fish believed that he had the authority to issue a written reprimand to a subordinate, but never did so. He did not believe that he had authority to independently suspend or terminate an employee.

50. BC McGowan has never made the decision to suspend or discharge an employee. He believes that the fire chief makes those decisions.

51. BC Goodson has never independently imposed economic discipline. Based on more than 18 years as a BC, Goodson is aware of two employees being given one-day suspensions without pay and two employees being terminated. In one suspension case, Goodson discovered that the employee had inappropriately called in sick. Goodson reported it to his supervisor, the deputy chief for operations, who took the matter to the fire chief. After consultation with the human resources department, the fire chief and deputy chief decided to suspend the employee for one day without pay. The fire chief called in the employee; Goodson, the deputy chief, and the president of the Union were also present when the chief gave the employee his suspension. The other suspension involved an employee on another shift, and did not involve Goodson in any way.

Both terminations involved employees on Goodson's shift. Both employees failed to pass their probationary period. Both Goodson and the Training BC made recommendations to the operations chief,¹³ who made a further recommendation to the fire chief. The fire chief terminated the individuals. One termination occurred in the 1990s and the other occurred in either 2007 or 2008.

BC Participation in Prior Labor Negotiations

52. BC Fish is listed as having been a member of the City's bargaining team during negotiations in 2001 and 2011.¹⁴ BC Bennett and BC Fish are listed as having served on the City's bargaining team during negotiations in 2008.¹⁵ None of the BCs served on the City's bargaining team during negotiations for the 2013-2016 collective bargaining agreement, which is the most recent contract.

53. The City has occasionally asked the BCs for their comments or input on certain issues at bargaining. During bargaining for the 2013-2016 collective bargaining agreement, the City was discussing guidelines concerning the granting of vacations and staffing with the Union. As a result, the City discussed the vacation proposal with command staff personnel, including some of the BCs. The City asked the BCs for their opinion or input on the proposed vacation scheduling and its possible implementation.

¹³In the 1990s, the City did not have deputy chief classifications. Instead, one of the BCs was designated as an operations chief. Later, the City established deputy chief positions as have been described in Findings of Fact 5-7.

¹⁴The other members listed for the 2011 City bargaining team included the director of human resources (as lead negotiator), Deputy Chief Kurt Bennett, and a representative from both the finance department and the human resources department.

¹⁵The other members listed for the 2008 City bargaining team included the director of human resources (as lead negotiator), the City's outside labor attorney, and representatives from the finance and the human resources departments. BC Kurt Bennett appears to have served on the City's bargaining team in the 1990s when he was chief of operations.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of these petitions.
2. In Case No. CC-002-14, the BCs are not supervisory employees.

DISCUSSION

Legal Context

During the 2014 legislative session, SB 1518 amended ORS 243.650(23) to read, in relevant part, as follows:

“Supervisory employee’ means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment. * * * Notwithstanding the provision of this subsection, ‘supervisory employee’ does not include:

(a) * * *

(b) A firefighter prohibited from striking by ORS 243.736 who assigns, transfers or directs the work of other employees but does not have the authority to hire, discharge or impose economic discipline on those employees.” Or Laws 2014, ch 15, § 1 (23).

Sections §§ 2 and 3 of SB 1518 state:

“SECTION 2. The amendments to ORS 243.650 by section 1 of this 2014 Act apply only to collective bargaining agreements executed on or after the effective date of this 2014 Act.

“SECTION 3. This 2014 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2014 Act takes effect on its passage.”¹⁶

The effective date of the amendments is March 3, 2014.

Initially, we must decide how Sections 2 and 3 of the Act apply to this petition. Section 3 is an emergency clause that establishes March 3, 2014, as the effective date of the statutory amendments. Section 2, however, states that the statutory amendments apply only to collective bargaining agreements executed on or after March 3, 2014.

The employees seeking representation in this petition are not members of any other existing bargaining unit. Rather, they seek to create a stand-alone bargaining unit of BCs, for whom a

¹⁶Only the definition of “supervisory employee” was amended.

collective bargaining agreement does not exist. If we grant this petition, any collective bargaining agreement on behalf of these employees would necessarily be executed after March 3, 2014. Therefore, Section 2 of the Act does not bar applying the statutory amendments to the employees in this petition.

Next, we must determine whether these BCs are supervisors under the revised definition of “supervisory employee,” which states that “‘supervisory employee’ does not include * * * [a] firefighter prohibited from striking by ORS 243.736 who assigns, transfers or directs the work of other employees but does not have the authority to hire, discharge or impose economic discipline on those employees.” ORS 243.650(23)(b). The parties agree that, under this statute, the dispositive issues are whether the petitioned-for BCs “have the authority to hire, discharge or impose economic discipline.” The City contends that the BCs have always possessed this authority and that the recent position descriptions merely “clarified” that longstanding authority. For the following reasons, we disagree with the City’s contention.

Hiring

We first address whether, as the City contends, the BCs have long had the authority to hire employees. The record establishes that the BCs participation in hiring has mostly consisted of being on interview panels, along with other non-bargaining unit and bargaining unit employees. The record does not establish that these interview panels possess the authority to hire employees. To the contrary, the fire chief has the sole authority and responsibility for making the decision to hire a firefighter. Moreover, this Board has consistently said that participation as a member of a hiring panel, when the employee’s individual vote carries the same weight as other members of the panel, does not establish that a potential supervisor has the authority to hire employees. *See City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13, 25 PECBR 996 (2014) (citing *City of Union v. Laborers' International Union of North America, Local 121*, Case No. UC-9-08, 22 PECBR 872, 887 (2008)). Where, as here, the fire chief holds complete sovereignty over hiring of employees, the participation of the BCs and others on the City’s hiring panels is insufficient to establish hiring authority. *See Tualatin Police Officers Association v. City of Tualatin*, Case No. UC-61-89, 12 PECBR 413, 422 (1990) (“the direct and substantial involvement of higher authority usually precludes an accurate assessment of the subordinate’s role and reflects * * * the retention of authority by management, rather than its delegation to a lower level.”).

Discharge and Economic Discipline

We next examine whether the BCs have historically possessed the authority to discharge or impose economic discipline. On this record, we conclude that, although the BCs have issued oral and written warnings, they have not independently imposed economic discipline or discharged anyone. Specifically, although a BC (along with captains and others) may initiate a disciplinary process, the deputy chief or fire chief would independently determine culpability, as well as the type and severity of discipline. Moreover, even when a BC has issued a written warning, it was done in consultation with and sanctioning by a deputy chief. Over the last 10 years, the City has terminated two firefighters and suspended two firefighters with loss of pay. The decision to terminate the firefighters was made by the fire chief, not a BC. Although the fire chief’s decision

took into account the Training BC's recommendation because the issue concerned employees who failed the training academy and probation, the record does not establish that the Training BC had the authority to discharge those employees. Likewise, the decisions to suspend the two employees were made by the deputy chief and fire chief, not a BC. Based on the record before us, we find that the BCs have not historically possessed the authority to impose economic discipline or terminate employees.

In sum, we disagree with the City's assertion that the BCs have had longstanding authority to hire, discharge and impose economic discipline on employees. Because, as argued by the City at oral argument, the April 2013 changes to the BCs' job descriptions were merely meant to clarify, rather than substantively change the BCs' authority to hire, discharge and impose economic discipline, it follows that the BCs still lack such authority. Consequently, we conclude that this record does not establish that the BCs are supervisory employees within the meaning of ORS 243.650(23)(b).

3. In Case No. CC-002-14, the BCs are not confidential employees.

The City also asserts that all five BCs are confidential employees under the PECBA. ORS 243.650(6) provides that a "[c]onfidential employee" means one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining." Under ORS 243.650(19), a confidential employee is not a public employee and, therefore, may not be included in a bargaining unit.

In determining whether an individual is a confidential employee, we apply a three-part test, each part of which must be satisfied: (1) Does the purportedly confidential employee provide assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining? (2) Does the assistance relate to collective bargaining negotiations and administration of a collective bargaining agreement? (3) Is it reasonably necessary for the employee to be designated as confidential in order to provide protection against the premature disclosure of management's collective bargaining policies, proposals, and strategies? *IAFF Local 851 v. Lane Rural Fire/Rescue*, Case No. RC-7-03, 20 PECBR 512, 521 (2003); *AFSCME, Council 75 v. Illinois Valley Fire District*, Case No. RC-38-97, 17 PECBR 493, 498 (1998). To be a "confidential employee" within the meaning of ORS 243.650(6), the employee(s) at issue must *currently* act in a confidential capacity. *See, e.g., IBEW, Local Union No. 659 v. City of Canyonville*, Case No. UC-15-10, 23 PECBR 962, 968 (2010). Finally, the confidential assistance contemplated by the statute is narrow and determined by an employee's direct and specific involvement in collective bargaining matters. *Oregon Public Employes Union, Local 503, SEIU, AFL-CIO, CLC v. City of Beaverton*, Case No. UC-54-86, 10 PECBR 25, 31 (1987). With those standards in mind, we turn to whether the BCs are confidential employees.¹⁷

¹⁷As noted above, the City acknowledged at oral argument that the revised job descriptions clarified, rather than substantively changed, the BCs' duties. Thus, our analysis of whether the BCs are confidential employees does not turn on whether those clarifying documents are sufficient to establish confidential-employee status. Rather, our analysis focuses on whether the BCs have acted and continue to act as confidential employees.

Our “first inquiry is whether the manager or supervisor in question ‘formulates, determines and effectuates’ employer policies in the area of collective bargaining. A finding of confidential status requires a showing of confidential assistance to one who performs all three functions; i.e., formulates, determines, and effectuates employer policies in the area of collective bargaining.” *AFSCME Local 1724, Council 75, AFL-CIO v. City of Eugene*, Case No. UC-10-85, 9 PECBR 8591, 8599 (1986) (emphasis in original).

Although “confidential” employees are typically clerical employees who assist a manager or supervisor, the City argues that the “confidential” status applies to the BCs. The BCs are supervised by, or work under, two deputy chiefs and the fire chief. The record does not establish that the deputy chiefs or fire chief formulate, determine, and effectuate the City’s policies in the area of collective bargaining. Instead, we are asked to conclude that the BCs currently provide the director of human resources (who does formulate, determine and effectuate City policies in the area of collective bargaining) with confidential assistance in all three of those areas. The best evidence of such authority consists of the previous director of human resources asking the BCs for their input on a vacation proposal during the City’s and the Union’s bargaining over their most recent contract. The record does not establish, however, that the BCs provided confidential assistance to the human resources director. Specifically, the BCs provided their opinions on the proposed vacation schedule, particularly on how it could be implemented given the staffing needs. The information that they provided was not possessed only by the BCs and the record does not establish that the feedback provided by the BCs was (or was intended to be) confidential. *See Oregon AFSCME, Council 75 v. Eastern Oregon Correctional Institution*, Case No. UC-76-87, 10 PECBR 820, 828-29 (1988) (merely providing input to a manager on collective bargaining matters does not amount to confidential assistance); *City of Eugene*, 9 PECBR at 8601 (mere access to information regarding labor negotiations does not establish confidential assistance). Moreover, that isolated past request for input on a vacation proposal request does not establish that the BCs currently provide confidential assistance to the director of human resources. Under these circumstances, we do not conclude that the BCs are confidential employees under ORS 243.650(6).

As set forth above, the second and third elements of our confidential-employee test require that the first element be satisfied. Because that first element has not been satisfied on this record, the BCs are not confidential employees.

Even if we assumed, however, that the BCs currently provide confidential assistance to the human resources director, we would still conclude that the BCs are not confidential employees under the other two elements. As set forth above, the second element requires that the confidential assistance concerns collective bargaining. *See Lane Rural Fire/Rescue*, 20 PECBR at 521. To be sure, the “vacation-proposal” incident cited above concerned collective bargaining. The City also asserts that a prior BC sat with the City’s bargaining team during a prior episode of contract negotiations.

None of the BCs, however, sat with the City’s bargaining team during the parties’ 2013-2016 contract negotiations. As previously explained, the statute requires that a confidential employee *currently* act in a confidential capacity. The isolated past example cited by the City does not satisfy that requirement, particularly when the more recent history indicates otherwise.

Moreover, the presence of *one* BC sitting with the City's bargaining team during past collective bargaining does not establish that *all* of the BCs *currently* perform that function.

With respect to the human resources director seeking input from BCs on a vacation proposal during the negotiations for the 2013-16 collective bargaining agreement, we have concluded in other similar situations that merely providing input is insufficient to consider such employees as confidential. *See Eastern Oregon Correctional Institution*, 10 PECBR at 828-29; *City of Beaverton* 10 PECBR at 30-32; *City of Eugene*, 9 PECBR at 8600.

The third element of our confidential-employee test is also not satisfied. Under the third element, we ask whether it is reasonably *necessary* for the employee to be designated as confidential in order to provide protection against the premature disclosure of management's collective bargaining policies, proposals, and strategies. *Lane Rural Fire/Rescue*, 20 PECBR at 521. In making that determination, we seek to avoid the proliferation of confidential employees. *City of Beaverton*, 10 PECBR at 31. Thus, the mere fact that management finds it more convenient to utilize an employee for confidential aid or assistance will not justify undue proliferation of confidential employee status. *Id.*

The City seeks to have all five BCs designated as confidential employees. That amounts to the entire unit sought in Case No. CC-002-14. However, the City does not suggest any specific rationale for the *necessity* of such an arrangement, other than an implied convenience. The City's position could lead to an unacceptable result; that is, an employer could effectively vitiate the existence of a bargaining unit and negate bargaining rights under the PECBA by bestowing confidential status on an excessive number of bargaining unit employees; and this could be accomplished by merely soliciting the employees' input or comments on bargaining proposals. Again, even assuming that the BCs are currently providing confidential assistance to the City concerning collective bargaining, the record does not establish that such assistance by all five BCs is reasonably necessary. Although it might be more convenient to have all five BCs provide confidential assistance to bargaining, we find no compelling reason for doing so in this case. We adhere to a long established policy that an employer cannot justify proliferation of confidential employees solely on the ground "that it is convenient" to have a larger number of employees provide assistance. *Rogue Community College*, 5 PECBR at 4130; also see *Baker School District 5J*, 5 PECBR at 2935 (the employer's convenience alone is insufficient to exclude support services secretary). We also have not been inclined to find confidential status where the amount or extent of assistance provided was insignificant, as is the instant case with a BC providing an opinion on a proposed vacation schedule. *AFSCME Local Union No. 2746 v. Clatsop County*, Case No. UC-4-93, 14 PECBR 434, 438-39 (1993) (assistant provided minimal amount of work toward collective bargaining process); *Pendleton School District 16R v. Oregon School Employees Association*, Chapter 115, Case Nos. C-208/218-83, 7 PECBR 6435 (1984) (employee involvement in bargaining matters was *de minimis*).

Finally, any assistance, or input, that the City might seek from the BCs can easily be obtained from the deputy chiefs and fire chief. *See City of Beaverton*, 10 PECBR at 33 (it was not reasonably necessary for employee to be designated as confidential when the information sought from that employee could have been obtained by currently excluded confidential employees). Accordingly, we conclude that it is not reasonably necessary for the BCs to be designated as

confidential in order to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies. *Oregon Cascades West Council of Governments*, 20 PECBR at 794-95.

In sum, we conclude that, on this record, the petitioned-for BCs are not confidential employees. Therefore, we decline the City's request to exclude them from the petitioned-for unit.

4. A bargaining unit of all regular employees of the Medford Fire Department in the Fire Battalion Chief classifications, including Fire Battalion Chiefs, Fire Battalion/Fire Marshal, and Fire Battalion Chief of Training and Safety; excluding all Firefighter, Fire Inspector, Fire Engineer, and Fire Captain classifications, supervisors, confidential and temporary employees, as petitioned for in Case No. CC-002-14, is an appropriate bargaining unit.

In Case No. CC-002-14, the Union seeks certification by means of the card check procedure to represent a bargaining unit of only BCs. The City initially objected that a unit of only BCs was not appropriate, but the recommended order concluded otherwise, and the City did not object to that conclusion.¹⁸ For the following reasons, we agree with the recommended order that the petitioned-for unit is *an* appropriate unit.

The card check procedure is set out in ORS 243.682(2)(a), which provides, in pertinent part, that

“when an employee, group of employees or labor organization acting on behalf of the employees files a petition alleging that a majority of employees in a unit appropriate for the purpose of collective bargaining wish to be represented by a labor organization for that purpose, the board shall investigate the petition. If the board finds that a majority of the employees in a unit appropriate for bargaining have signed authorizations designating the labor organization specified in the petition as the employees' bargaining representative * * * the board may not conduct an election but shall certify the labor organization as the exclusive representative[.]”

In deciding whether a proposed bargaining unit is appropriate, this Board “consider[s] such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees.” ORS 243.682(1)(a); see also *Oregon AFSCME Council 75 v. Washington County*, Case No. CC-008-12, 25 PECBR 466, 473 (2013); *Klamath Community College Faculty Association, OEA/NEA v. Klamath Community College*, Case No. CC-03-09, 23 PECBR 484, 496 (2010). The list of statutory factors is not exclusive, and we have, along with the listed factors, weighed our preference for certifying the largest possible appropriate unit. *Washington County*, 25 PECBR at 473; *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001); *U of O Chapter, AFT v. U of O*, 92 Or App 614, 618-19, 759 P2d 1112 (1988). In determining what constitutes an appropriate bargaining unit, we have discretion to decide how much weight to give each relevant factor in any particular case. *OPEU*, 173 Or App at 436; *U of O*, 92 Or App at 617-18; *Washington*

¹⁸The City has, consequently, waived and failed to preserve any objection to the appropriateness of the BC-only unit.

County, 25 PECBR at 473. Finally, we may determine a unit to be appropriate, even though some other unit might also be appropriate. ORS 243.682(1)(a); *OPEU*, 173 Or App at 436; *Washington County*, 25 PECBR at 474. With those factors in mind, we turn to the appropriateness of the proposed unit.

We first address the “community of interest” of the proposed BC unit. The term “community of interest” includes such factors as “similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, [and] common supervisor[s].” OAR-115-025-0050(2); *see also Washington County*, 25 PECBR at 474. Here, although each BC may have slightly different duties, they work together with similar occupational and professional duties, responsibilities, and objectives; they report to the same supervisors and have the same location in the chain of command; they possess the same skill sets and receive common training; they can transfer among themselves; and they have the same promotional opportunities. Thus, the petitioned-for employees share a very strong community of interest. Likewise, the BCs largely share the same employment benefits, salary schedules, and other working conditions, another significant indicator that the petitioned-for unit is an appropriate unit.

Because the BCs were supervisory employees under the old statutory regime, they have no history of collective bargaining as a group. The City has a history of collective bargaining with different labor organizations, including a unit of firefighters.

The BCs have presented a showing of interest demonstrating that the BCs wish to be represented in a new unit consisting only of BCs.

Despite the substantial indicia that the petitioned-for unit is appropriate, the City has argued that we should find the unit inappropriate because it goes against our preference for certifying the largest possible bargaining unit. We have explained, however, that this preference should not be applied too rigidly and is but one factor among many that we consider. *See Washington County, Id.* at 475-76.

Here, we find that the overwhelming weight of the factors establish that the petitioned-for unit is *an* appropriate unit. Moreover, because of section 2 of SB 1518, it may well be that a unit of only BCs is, for the time being, the largest appropriate unit. In any event, we conclude that, under the circumstances of this case, the BCs shared community of interest, wages, hours, and other working conditions, and the shared desired of the BCs should be given the greatest weight. *See OPEU*, 173 Or App at 436 (we have discretion to decide how much weight to give each relevant factor in any particular case); *U of O*, 92 Or App at 617-18 (same); *Washington County*, 25 PECBR at 473 (same). After weighing all of the factors, we conclude that the petitioned-for unit is appropriate, even though other units may also be appropriate. *See ORS 243.682(1)(a); OPEU*, 173 Or App at 436.

ORDER

1. Case No. CU-003-14 and Case No. CC-002-14 are herein consolidated for purposes of this Order.

2. With respect to Case No. CC-002-14, the battalion chiefs are not supervisory employees under ORS 243.650(23)(b) or confidential employees under ORS 243.650(6).

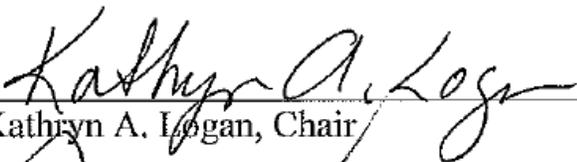
3. The unit proposed by Petitioners in Case No. CC-002-14 is an appropriate bargaining unit. This bargaining unit includes:

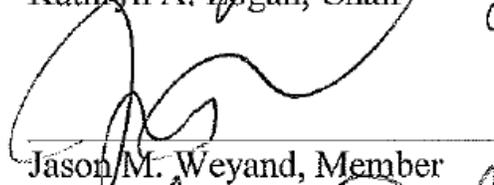
All regular employees of the Medford Fire Department in the Fire Battalion Chief classifications, including Fire Battalion Chiefs, Fire Battalion/Fire Marshal, and Fire Battalion Chief of Training and Safety; excluding all Firefighter, Fire Inspector, Fire Engineer, and Fire Captain classifications, supervisors, confidential and temporary employees.

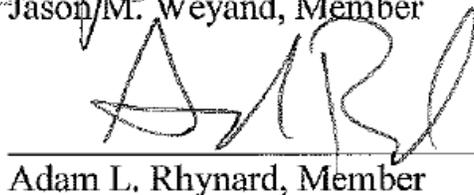
5. The Elections Coordinator shall check the showing of interest against the original list of employees provided by the City. If it is determined that a majority of the employees in the designated bargaining unit wish to be represented by the Union for purposes of collective bargaining, this Board shall certify the Union as the exclusive representative of the bargaining unit.

6. The petition in Case No. CU-003-14 is dismissed.

Dated this 18 day of December, 2014.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.