



We conclude that the OASr in the Benefits Office is not a confidential employee and is properly included in the Union's bargaining unit. Therefore, we will grant the Union's petition.

### RULINGS

The Union failed to exchange exhibit and witness lists within the time frame designated in the ALJ's prehearing letter. The ALJ acted properly within his discretion in declining to receive the testimony of the Union's witnesses and in declining to receive the Union's exhibits into the record. However, the ALJ directed that the employee currently holding the position must testify because this matter involves the statutory status of an employee and because there is no burden of proof in such matters. The remaining rulings of the ALJ were reviewed and are correct.

### FINDINGS OF FACT

#### The Parties

1. The County is a public employer as defined by ORS 243.650(20). The Union is a labor organization within the meaning of ORS 243.650(13), and the exclusive representative of a bargaining unit of County employees.

2. The Union and the County were parties to a 2011-2014 collective bargaining agreement (Agreement) that expired on June 30, 2014. The parties began negotiations for a successor agreement in March 2014, and had not reached agreement at the time of hearing.

#### The County Labor Relations and Benefits Offices

3. In September 2013, the County hired Alyssa Sonne as a temporary OASr in the Benefits Office. In March 2014, the County reclassified the OASr from a bargaining-unit classification to an excluded "confidential" classification. In May 2014, the County made Sonne's appointment permanent, and she continues to be the OASr in the Benefits Office.

3. Both the County's Labor Relations and Benefits Offices are located on the third floor of the County's main administration building.

4. Steve Herron, the County's Labor Relations and Class and Compensation Director (Labor Director), is in charge of the County Labor Relations Office. The Labor Relations Office also includes three human resource managers, one human resource technician, and an Office Assistant 2/NR. None of the Labor Relations staff is a member of a bargaining unit. The Labor Director also oversees the Classification and Compensation Office, with four full-time employees. The Labor Director reports to the County Director of Central Human Resources, Travis Graves.

5. The County Benefits and Wellness Manager (Benefits Manager) is in charge of the Benefits and Wellness Department. The Benefits Manager reports to County Director Graves. The Benefits Office is staffed by a benefits operations manager, five human resource analysts, a human resources technician, and the OASr. The benefits operations manager is the OASr's direct supervisor. The OASr position was the only position in the benefits office that had historically

been part of a bargaining unit until the County unilaterally designated the position as confidential and removed it from the Union unit in early 2014. The Benefits Manager also oversees the Wellness Office, with three full-time equivalent employees.

6. The Benefits Manager oversees the County's relationships with providers of medical, dental, and other benefits for the Union's County employees and other County employees. It also performs research and planning regarding future benefit needs and vendor options.

7. The two most recent Benefits Managers have not served on the County's bargaining team, but have occasionally attended bargaining sessions related to benefits.

#### County benefits and collective bargaining

8. Article 11(I)(B)(1) of the Agreement provided for the creation of an Employee Benefit Team (EBT), comprised of Union and County representatives to collaborate on health care cost containment and possible plan design changes that might be necessary during the term of the Agreement. The Agreement provided that the EBT would meet to review and approve non-mandated proposed changes in plan designs, changes in plans offered, or changes in carriers, before implementation for the following plan year. The Agreement also provided that changes in plans or plan designs that are mandated by carriers, and that cannot be resolved by the EBT, would be subject to Public Employee Collective Bargaining Act (PECBA) bargaining procedures.

9. In 2011, the EBT was the only committee of its kind in the County. Herron began work as the Labor Director in mid-2011, and one of his charges was to increase collaboration and communication between the County and County unions about benefits issues. This effort was based in part on future changes in County benefits mandated by the federal Patient Protection and Affordable Care Act, commonly referred to as the Affordable Care Act (ACA). Pub L 111-148, 124 Stat 119 (2010). Some of the required changes were expanding dependent coverage for adult children, eliminating annual and lifetime limits on medical plans, expanding preventative care, modifying the Flexible Spending Account (FSA) annual maximum election, addressing insurance plan 'grandfather' status and an excise tax on certain types of plans.

10. The Labor Director began obtaining the agreement of other County unions to join the EBT, and it was renamed the Employee Benefits Advisory Team (EBAT). The County continued to negotiate successor collective bargaining agreements with other unions and secured their contractual agreement to participate in EBAT. At the time of hearing, nine County unions were participating in the EBAT process, one union had agreed to do so in the future, and the remaining union had a "me too" agreement with the County based on another participating union.

11. The County's goals regarding the EBAT also included reaching consensus or agreement between the parties regarding the need for changes in benefits and the menu of options for those changes, if not specific changes, for current and future years. Collective bargaining between the County and the various unions would then proceed in light of the consensus established by the EBAT.

12. One future impact of the ACA on the County medical insurance plans is an imposition of excise taxes on the County if certain features of the County plans are not changed.<sup>2</sup> After passage of the ACA, the Benefits Office was doing substantial work to prepare the County for those changes. The Benefits Manager took back aspects of administration of County benefits plans from the consultants, and performed more work with the Labor Director and the Labor Relations Office.

13. During 2013, then Benefits Manager Abbey Hendricks was concerned about using the OASr, who was in the bargaining unit, to assist in gathering, drafting, or preparing information, or to work with the Labor Director concerning strategic presentation of benefits-related information to the EBAT.

14. When Hendricks served as the Benefits Manager, she believed that her workload increased as a result of the way that the previous, non-confidential OASr was used. Hendricks believed that this increased workload included preparing materials for distribution at EBAT and other meetings, consolidating different materials together, photocopying, proofreading, revising materials to ensure they made sense to a layperson, and planning meetings, including meetings with representatives of Kaiser Permanente and Moda Health.

15. In 2013, Hendricks proposed to Herron and Graves that the OASr position be removed from the Union's bargaining unit. Hendricks believed that it was important that a non-represented employee perform certain EBAT and non-EBAT related duties, and that Union-represented employees should not see related documents before the final revisions were made. At the time, the position was held by an employee who was also a Union steward, and Herron demurred. However, the position became vacant in late 2013 or early 2014, and the County began its internal process to remove the position from the Union bargaining unit over the Union's objection. In late February 2014, the Benefits Office Human Resources Manager submitted a Reclassification Request to the County Classification and Compensation Unit. The manager stated in part:

“This position is the only position in benefits that is represented and the risk of confidential negotiated benefits leakage is high. This position is privileged [*sic*] to all BU [bargaining unit] benefits changes or potential changes. I feel at this time that it is perfect timing to reclass this [OASr] to non-represented.”

16. Before the reclassification, the OASr position description stated that the employee “provides administrative support for all benefit administration staff, including generating reports, providing confidential personnel/benefits information, including for the purposes of retrieving, reviewing and compiling information for purposes of collective bargaining.” That position description's list of essential job functions provided that 50% of the employee's time is spent on reception and administrative support for Benefits and Wellness, a category of work that included participating in meetings related to bargaining.

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<sup>2</sup>See generally, 26 USC §4980I (excise tax on high-cost employer sponsored health plan).

17. The County Classification and Compensation Unit approved the reclassification request in early March 2014.

18. The first purportedly confidential task that Hendricks assigned to the OASr was preparing a handout to be distributed at an EBAT meeting. The handout was a compilation of various Kaiser and Moda proposals for plan changes for the next plan year, 2015, including changes written by Kaiser, Moda, and Hendricks. The proposed changes included changes related to the ACA (such as changes to ACA grandfathered status), changes related to plan eligibility, and changes related to the Kaiser out-of-pocket maximums. The handout included Hendricks' preliminary recommendations. Hendricks prepared a draft of the handout herself, and then had the OASr review it for comprehensibility to a layperson, make copies of the handout, and set it out for the EBAT meeting.

19. In June 2014, Hendricks took another position within the County. Hendricks was succeeded by Karen Daly, who started working for the County as the new Benefits Manager on June 9, 2014. Consequently, the current OASr only worked with Hendricks for approximately one month before Daly took over the Benefits Department.

20. At the time of the hearing, Daly had only supervised Sonne for three months. During that time, Sonne continued to take minutes of the EBAT meetings. Sonne forwarded those minutes to Daly, who generally accepted them as written. The Benefits Manager and Labor Director could review those minutes and make alterations to them to remove, emphasize, or de-emphasize certain items. However, by the time of the hearing, Sonne had not been asked to make any substantive changes to the EBAT minutes. The final minutes are circulated to the union EBAT members for approval at the following EBAT meeting.

21. Sonne testified that the only new duties actually assigned to her since being granted confidential status pertain to EBAT meetings. Those duties are: (1) to review, revise, and copy the materials to be handed out in advance of the monthly EBAT meetings, (2) to attend and take notes at the EBAT meetings, and (3) to revise her notes afterwards and then e-mail them to the Benefits Manager and, once she has approved them, e-mail them to the EBAT participants. Sonne estimates that she spends approximately six to seven hours each month on these tasks, including two hours preparing handouts before the meeting, two hours taking notes at the meeting, and two to three hours revising and distributing the notes.

22. Sonne also assists the Benefits Manager in planning benefits-related meetings, including meetings with County vendors. In providing this assistance, Sonne often will learn the purpose of a proposed meeting. The purpose, as described to her, is typically brief, such as to review prescription plan options for a unit of prosecuting attorneys.

23. Sonne did not recall attending meetings with the Benefits Manager other than EBAT and Benefits Office staff meetings. At staff meetings, the Benefits Manager has given updates regarding benefit related collective bargaining negotiations. Sonne has not attended any collective bargaining sessions and Herron uses the HR Tech in Labor Relations as the minutes-taker for collective bargaining. In the event that the HR Tech is unavailable, Herron uses the Office Assistant 2 in Labor Relations for that task. If neither of those two was available, Herron

would use the Administrative Analyst under the HR Director. If all three of those individuals were unavailable, Herron anticipated that he would ask Sonne to take bargaining minutes.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The OASr in the Benefits Office is not a confidential employee and is properly included in the bargaining unit.

#### Standards for decision

The PECBA defines a confidential employee as “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.” ORS 243.650(6). Because the terms are listed in the conjunctive, for us to conclude that an employee is confidential, the employee must provide confidential assistance to one who performs all three functions; *i.e.*, one who 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). This Board applies a three-part test to determine the confidential status of an employee: (1) Does the allegedly 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 to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies? *Service Employees International Union Local 503, Oregon Public Employees Union v. Oregon Cascades West Council of Governments*, Case No. UC-16-04, 20 PECBR 786, 793 (2004); *AFSCME, Council 75 v. Illinois Valley Fire District*, Case No. RC-38-97, 17 PECBR 493, 498 (1998).

To be classified as a confidential employee under the PECBA, “the employee[] at issue must *currently* act in a confidential capacity.” *Group of Unrepresented Battalion Chiefs Employed by the City of Medford v. City of Medford*, and *IAFF Local 1431 v. City of Medford*, Case Nos. CU-003-14 & CC-002-14, 26 PECBR 294, 316 (2014) (emphasis in the original). Additionally, “the confidential assistance contemplated by the statute is narrow and determined by an employee’s direct and specific involvement in collective bargaining matters.” *Id.*, citing to *Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC v. City of Beaverton*, Case No. UC-54-86, 10 PECBR 25, 31 (1987).

Finally, in a unit clarification case such as this, no party bears the burden of proof. OAR 115-010-0070(5)(a). Nevertheless, because this case involves a statutory exclusion to the definition of “public employee,” there must be sufficient evidence establishing that the exclusion applies before we will conclude that an otherwise public employee is a confidential employee. In the absence of detailed, specific evidence establishing that a putative confidential employee meets the statutory definition, we will conclude that the employee is a public employee covered by the

PECBA and not a confidential employee under the statute. *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13, 25 PECBR 996, 1018 (2014).

### Analysis

We first consider whether Sonne provides assistance to an individual who formulates, determines, and effectuates management policies in the area of collective bargaining. Here, the record establishes that Sonne provides assistance to Daly, the current Benefits Manager. As of the hearing, Sonne had provided that assistance for about three months. Although Daly effectuates management policies with respect to employee benefits, a key aspect of collective bargaining, she does not formulate and determine management policies in this area. Specifically, Daly does not serve as a member of the County's collective bargaining team, and the record does not establish that she makes substantive decisions on what direction the County's negotiating team should take during bargaining. Rather, the evidence establishes that Daly's role is largely limited to implementing (*i.e.*, effectuating) whatever benefits-related decisions are made by other County officials. Although Daly also provides technical updates and guidance on changes in benefits laws and changes in plans offered by County vendors, she does not formulate and determine the County's benefits policies in collective bargaining. The same is true for Hendricks, whom Sonne assisted for approximately one month before Daly became the Benefits Manager. Because the Benefits Manager does not determine and formulate management policies in the area of collective bargaining, Sonne's assistance to that manager does not render her a confidential employee.

The County argues, however, that Sonne is a confidential employee because she assists Daly, and Daly assists Herron, who does formulate, determine, and effectuate management policies in the area of collective bargaining. Although we agree with the County's characterization of Herron's authority, we disagree with the County's assertion that Sonne, who works in the Benefits Office under Daly, provides Herron with confidential assistance. The record does not establish that Herron has directly assigned work to Sonne or asked her to provide him with any particular assistance. At most, Herron anticipates that he might, in the future, use Sonne as a third back-up to take notes in collective bargaining sessions. Such speculative future potential confidential use does not establish that Sonne currently provides confidential assistance to Herron. *See City of Medford*, 26 PECBR at 316 (to be classified as a confidential employee under the PECBA, the employee must *currently* act in a confidential capacity); *Oregon Cascades West Council of Governments*, 20 PECBR at 793 (employees designated to back up a confidential employee are not confidential employees). Therefore, under the County's theory, Sonne does not provide confidential assistance to anyone who formulates, determines, and effectuates management policies in the area of collective bargaining. Consequently, she is not a confidential employee.<sup>3</sup>

Based on the record before us, we conclude that the OASr is not a confidential employee under ORS 243.650(6). Accordingly, she should be included in the Union's bargaining unit. We will grant the Union's petition.

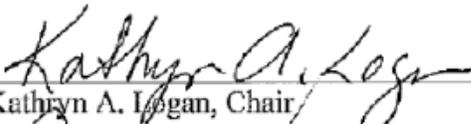
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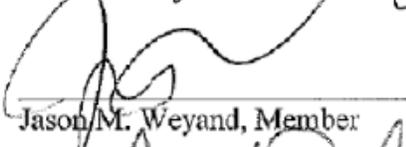
<sup>3</sup>Because Sonne does not meet the first of our three-part test for confidential employee status, we need not address the remaining two tests.

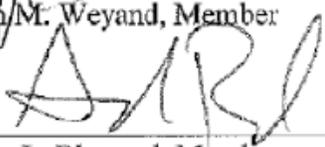
ORDER

The Union's petition is granted. The bargaining unit is clarified to include the Office Assistant Senior (OASr) in the County Benefits Office.

Dated this 8 day of May, 2015.

  
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Kathryn A. Logan, Chair

  
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Jason M. Weyand, Member

  
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Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.