

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-16-04

(UNIT CLARIFICATION)

SERVICE EMPLOYEES INTERNATIONAL )	
UNION LOCAL 503, OREGON PUBLIC )	
EMPLOYEES UNION, )	
)	
) Petitioner, )	RULINGS,
)	FINDINGS OF FACT,
) v. )	CONCLUSIONS OF LAW,
)	AND ORDER
OREGON CASCADES WEST )	
COUNCIL OF GOVERNMENTS, )	
)	
) Respondent. )	
_____ )	

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on June 8, 2004, in Salem, Oregon. The record closed with submission of the parties' post-hearing briefs on July 12, 2004.

Elizabeth Baker, Attorney at Law, SEIU Local 503, OPEU, 1730 Commercial Street S.E., P.O. Box 12159, Salem, Oregon 97309-0159, represented Petitioner.

Chandra R. Hatfield, Attorney at Law, Williams, Zografos & Peck, 334 Third Street, P.O. Box 547, Lake Oswego, Oregon 97034, represented Respondent.

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Service Employees International Union Local 503, Oregon Public Employees Union (SEIU or Union) filed this unit clarification petition on March 10,

2004, seeking to include six additional employees in the unit. On March 24, 2004, the Oregon Cascades West Council of Governments (Council) timely filed objections to the petition, contending that the six employees were confidential employees. Prior to hearing, the parties agreed to the status of two employees.<sup>1</sup> A hearing was held on June 8, 2004, at which the parties presented testimony and other evidence regarding the status of the remaining four employees.

The issue is:

Are the positions of personnel executive assistant, senior accountant, accounting specialist, and finance administrative assistant appropriately excluded from the SEIU bargaining unit as confidential employee positions?

We conclude that two positions, the personnel executive assistant and senior accountant, are appropriately excluded from the SEIU bargaining unit as confidential employee positions.

#### RULINGS

The ALJ correctly admitted, over the Union's objection, evidence of work assigned to the employees in the positions at issue after this petition was filed. Such evidence is relevant, although this Board will view such evidence with caution. *See Polk County Deputy Sheriff's Association v. Polk County Sheriff's Department*, Case No. UC-61-94, 15 PECBR 845, 857 (1995); and *Washington County Professional Fire Fighters, Local 1660 v. Tualatin Valley Fire and Rescue District and City of Beaverton*, Case No. UC-17-94, 15 PECBR 427, 429 (1994).

The ALJ correctly admitted, over SEIU's objection, evidence of the involvement of the employees in the preparation of termination and severance agreements of Council employees. Termination and severance agreements of bargaining unit employees are part of the administration of a collective bargaining agreement (CBA).

The remaining rulings of the ALJ have been reviewed and are correct.

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<sup>1</sup>The parties agreed that a clerical specialist position was confidential, and that an executive assistant position was not confidential

## FINDINGS OF FACT

1. SEIU is a labor organization and the exclusive representative of a bargaining unit of approximately 90 employees employed by the Council, a public employer.

2. The Union and Council were parties to a CBA effective November 13, 2002, through September 30, 2004. The unit description contained in that CBA states:

“The Employer recognizes the Union as the exclusive bargaining representative for all employees excluding temporary, supervisory, and confidential employees.”

3. The Council provides government services to local governments and the public as delegated by its member city and county governments. Those services include senior and disability services, transportation planning, economic and community development, and public works and technology services assistance. The Council is comprised of three major divisions: Senior and Disability Services Division, Community and Economic Development Division, and the Technology Support Division. The Council is governed by a board comprised of officials from its member governments.

4. SEIU and the Council have had a collective bargaining relationship since 1986. In recent negotiations, the parties have used a form of interest-based collective bargaining. SEIU does not arrive at a specific agenda or perform independent research prior to bargaining. The Council arrives at a set of strategic goals prior to bargaining, and caucuses frequently regarding such issues as whether the proposal at hand advances those goals. It performs independent research prior to and during bargaining. The Council does not always share the results of its research, or the particular subjects of its research, with SEIU.

5. The parties spend significant time in collective bargaining. The 2002-2004 agreement required approximately 50 bargaining sessions of four to eight hours each. Including a wage reopener, the parties were engaged in collective bargaining all but six months of the last three years. The parties began negotiations for the successor agreement in May 2004.

6. At the time of hearing, the Council's negotiating team consisted of Executive Director Bill Wagner, Human Resources Director Lydia George, and Finance Director Jeanette Denos, as well as Senior Services Director Scott Bond, Community and Economic Development Director Cynthia Solie, and Technology Services Director Steve Martinenko.

7. The Council's general administrative office performs the human resources and financial services for the Council. The employees in that office include Wagner, George, and Denos. A clerical specialist, Diana Crumpton, provides clerical support to the office, primarily to Wagner. The parties agree that Crumpton's clerical specialist position is confidential.

8. The status of four employees is in dispute. They are: Personnel Executive Assistant Kathleen Shepard; Finance Administrative Assistant Debbie Halvorson; Senior Accountant Sue Forty; and Accounting Specialist Kristy Nofziger.

9. No later than 1998, the Union and the Council agreed that two positions would be designated confidential executive assistants. One position was designated to assist the executive director. The other position was designated to assist the senior services director. In 2001-2002, the Council reorganized. As part of its reorganization, the Council retained the confidential position which assists the executive director, now the clerical specialist position held by Crumpton. The duties of the second confidential position were divided between Personnel Executive Assistant Shepard's position and another clerical specialist supervised by George.

10. In 2000, the Council hired Personnel Executive Assistant Shepard to assist Human Resources Director George. In 2002, the Council brought its financial functions in-house, creating several new positions and hiring Finance Director Denos. Shortly thereafter, Denos hired Senior Accountant Forty, Finance Administrative Assistant Halvorson, and Accounting Specialist Nofziger.

***HUMAN RESOURCES DIVISION: PERSONNEL EXECUTIVE ASSISTANT SHEPARD***

11. Human Resources Director George sits at the bargaining and litigation tables for the Council in negotiations and adjudications regarding CBAs, grievances, arbitrations, and this unit clarification proceeding; assists managers with discipline of bargaining unit members; and develops and interprets the Council's personnel policies. She is also responsible for the day-to-day administration of the contract on behalf of the Council.

12. Because of bargaining, and other duties, George is generally unavailable for other human resource duties 30 percent of the time. George has delegated some of her duties to Shepard, who also does substantial work for George in George's absence.

13. Shepard has received training in human resources work from a community college class and a two-day workshop. She has also received substantial on-the-job training from George.

14. Shepard maintains job descriptions through conversations with managers; processes employee performance reviews; and handles all Council recruitment for new employees, which is subject to CBA requirements regarding the offers of positions to internal candidates. As part of that recruitment, Shepard discusses the viability of internal candidates with the relevant managers before seeking outside candidates and prepares interview questions for candidates. Shepard devotes approximately one-eighth of her work time to the recruitment and hiring process.

15. Shepard has performed benefits survey research for George for her use in collective bargaining.

16. George has delegated the handling of safety issues to Shepard, who performs ergonomic assessments, acts as Council representative for SAIF claims, sits as a nonrepresented/management member on the employer/SEIU safety committee, and orders relevant equipment. Shepard spends one-fourth of her time on safety issues.

17. Shepard also coordinates training for Council employees.

18. In order to perform her own duties, as well as George's during the time George is unavailable, Shepard has access to all Council personnel records and George's computer files.

***FINANCE DIVISION: SENIOR ACCOUNTANT FORTY, FINANCE ADMINISTRATIVE ASSISTANT HALVORSON, AND ACCOUNTING SPECIALIST NOFZIGER***

19. The Council, which operates with public funds, is subject to standards and duties imposed by ethical accounting practices and government audits. As part of those obligations, the Council has separated its payroll responsibilities from reconciliation work and accounts payable or receivable tasks.

20. The Finance Division has four employees: Finance Director Denos, Senior Accountant Forty, Finance Administrative Assistant Halvorson, and Accounting Specialist Nofziger.

21. Denos is responsible for all Council financial reports, analysis, budgets, and compliance with legal requirements. Denos' work takes her out of the office 50 to 70 percent of the time.

22. Denos is a member of the Council's negotiating team. She formulates bargaining proposals related to the Council's financial activities and the requirements

of its federal and State funding. Denos assigns each of her staff to perform research for bargaining because she does not have the time, nor computer training, to do it herself.<sup>2</sup>

#### *SENIOR ACCOUNTANT FORTY*

23. Senior Accountant Forty has primary responsibility for the Council's payroll, which takes 60 to 70 percent of her time. As part of that function, she is guided by the Council's interpretation of the terms of the CBA. In April 2004, Forty received a request for compassionate leave and direction from the employee's manager to grant the request. Forty concluded that the request was not authorized by the CBA and after discussing the matter with George, denied the leave request.<sup>3</sup>

24. Forty denies sick leave draws to employees in the event the leave fails to conform to the terms of the CBA. Forty also processes all separations from Council employment. Council managers often disclose anticipated employee terminations to Forty to permit her to calculate benefits payable upon the employee's termination. Forty sometimes does this before the employee is aware of their impending termination. Forty also prepares all severance checks pursuant to severance agreements with bargaining and nonbargaining unit employees, which are confidential and not shared with SEIU.

25. Forty has performed research for Denos, George, and Wagner regarding issues in collective bargaining. Her research has included: the represented status of Council employees by department; insurance costs; insurance utilization by Council bargaining unit employees; cost of fringe benefit options; and cost scenario analysis. Denos is not trained to perform this research. Forty spends about 10 percent of her time on bargaining-related research. Forty has met with the management bargaining team to discuss and make suggestions regarding proposals related to her research. Forty has not attended any bargaining sessions.

#### *ACCOUNTING SPECIALIST NOFZIGER*

26. Nofziger, the accounting specialist, issues checks, verifies the payroll, and ensures that payroll checks match their recorded amounts. She is also responsible

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<sup>2</sup>Denos believes it would take six to nine months for her to be trained to do this research herself. Some of the research can be performed by outside vendors, at a cost.

<sup>3</sup>Forty believes she did not have the authority to deny this request without consulting with her supervisor because the request came from a manager. Forty is able to apply the terms of the CBA when they are clear. Where the terms of the CBA are unclear, or more than one interpretation is possible, Forty turns to her superiors for assistance.

for accounts payable and receivable, and assists Denos with preparation for the annual audit of the Council. Nofziger also tracks and pays employee travel expenses, which require her to consult the CBA and Denos regarding Council management's interpretation of the CBA. Nofziger also oversees the Council's cafeteria-style health insurance plan and tracks plan usage. She provides information regarding that usage to Denos for use in bargaining. Denos also assigns bargaining research to Nofziger. At the time of hearing, Nofziger was researching trends of expenditures in three areas to aid the bargaining team. Nofziger has not attended any bargaining sessions.

27. Denos assigns some bargaining research to Nofziger because as a result of the separation of financial duties in the department, Forty does not have access to the information while Halvorson does not have the level of knowledge necessary to perform that research.

#### *FINANCE ADMINISTRATIVE ASSISTANT HALVORSON*

28. Halvorson, the finance administrative assistant, is the only clerical support for Denos. Halvorson assists Denos in preparing confidential Council budget drafts and final public Council budgets. She has access to all of Denos' files and all employee personnel files. Halvorson spends 10 percent of her time tracking Council staff levels relative to one source of its funding, Medicaid. Because of this work, Halvorson has advance knowledge of which employees might be subject to lay off, although the information at issue is publicly available. Halvorson also collects employee time sheets and acts as a backup to Nofziger in accounts payable/receivable.

29. Denos has assigned bargaining research to Halvorson. That research has consisted of pulling together information from the files she maintains, such as historical information regarding bargaining.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The personnel executive assistant and senior accountant are appropriately excluded from the SEIU bargaining unit as confidential employee positions. The positions of accounting specialist and finance administrative assistant are not confidential and are included in the bargaining unit.

## STANDARDS FOR DECISION

Confidential employees are not “public employees” under the Public Employee Collective Bargaining Act (PECBA), and are, therefore, excluded from bargaining units certified by this Board. ORS 243.650(19). 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). 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? \* \* \*”  
*AFSCME, Council 75 v. Illinois Valley Fire District*, Case No. RC-38-97, 17 PECBR 493, 498 (1998) (paragraph breaks added).

*See also Oregon AFSCME Council 75, AFL-CIO v. SAIF Corporation*, Case No. RC-6-01, 19 PECBR 399 (2001), *citing OSEA v. Phoenix Talent School District*, Case No. UC-10-93, 14 PECBR 776 (1993).

This Board seeks to avoid the proliferation of confidential employees; our touchstone is what is “reasonable under the circumstances.” *Oregon Public Employees Union, Local 503 v. City of Beaverton*, Case No. UC-54-86, 10 PECBR 25, 31 (1987). Employee access to confidential or sensitive documents, such as personnel or disciplinary records, does not render the employee confidential for purposes of the PECBA. *SAIF Corporation, supra*. An employee’s involvement in costing bargaining proposals or alternative wage schedules, without more, is not sufficient to designate the employee as a confidential employee, even where the research is considered confidential by the employer. *AFSCME Local Union 2746 v. Clatsop County*, Case No. UC-4-93, 14 PECBR 434, 438-439 (1993). Employees designated to back up a confidential employee do not thereby become confidential employees. *Reynolds School Dist. v. OSEA*, Case No. C-197-

79, 6 PECBR 4543, 4552 (1981), *aff'd* 58 Or App 609, 650 P2d 119 (1982). With these standards in mind, we turn to the positions at issue in this case.

**Human Resources (Personnel Executive Assistant Shepard):** Shepard provides assistance to Human Resources Director George. George actually formulates, determines, and effectuates management policies in the area of collective bargaining. George sits at the bargaining table in an interest-based bargaining process and in arbitrations. She develops collective bargaining proposals and administers the CBA through the grievance process and through day-to-day interpretation of the CBA. Shepard's assistance relates to collective bargaining negotiations and administration of a collective bargaining agreement. It is reasonably necessary for Shepard to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies. Shepard is heavily involved in decisions regarding whether the CBA standards for internal or external recruitment are applicable to a job opening and provides assistance in collective bargaining. The duties of her position were originally part of a position designated as confidential by agreement between the parties. Shepard's position is confidential.

**Finance Department (Senior Accountant Forty):** Forty provides assistance to Finance Director Denos, an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining. Forty's assistance relates to collective bargaining negotiations and administration of a collective bargaining agreement. Forty spends about 10 percent of her time on bargaining-related research; her research is not confined to cost scenarios; and she has met with the management bargaining team to discuss and make suggestions regarding proposals related to her research. We conclude that it is reasonably necessary for Forty to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies.

**Finance Department (Accounting Specialist Nofziger):** Nofziger provides assistance to Denos, an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining. Nofziger has provided a limited amount of assistance relating to collective bargaining negotiations and administration of a collective bargaining agreement, primarily by researching expenditure trends and utilization costs. We conclude that it is not reasonably necessary for Nofziger to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies.

**Finance Department (Finance Administrative Assistant Halvorson):** Like Forty and Nofziger, Halvorson provides assistance to Denos, an individual who actually formulates, determines, and effectuates management policies in the area of

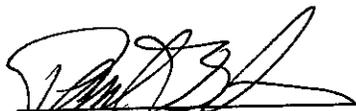
collective bargaining, and that assistance relates to collective bargaining negotiations and administration of a collective bargaining agreement. Halvorson spends 10 percent of her time tracking Council staff levels relative to one source of its funding, Medicaid. Halvorson is also aware of which funds support which staff positions. The Council argues that this information gives Halvorson an early picture of what employees may be subject to layoff. However, this information is public and reflects external pressures on the Council, not the Council's own priorities or bargaining strategies. Halvorson also runs computer programs to determine the cost of various wage and benefit levels, a task which we have previously determined is not determinative of confidential status. *AFSCME Local Union 2746 v. Clatsop County, supra*. We conclude that it is not reasonably necessary for Halvorson to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies.

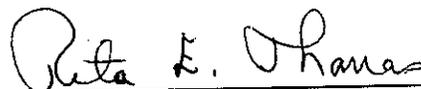
The petition is granted as to the accounting specialist and finance administrative assistant. These positions are appropriately included in the SEIU bargaining unit. The personnel executive assistant and senior accountant are appropriately excluded from the SEIU bargaining unit.

ORDER

The accounting specialist and finance administrative assistant positions are not confidential and are included in the bargaining unit. The personnel executive assistant and the senior accountant positions are confidential and are excluded from the bargaining unit.

DATED this 29<sup>th</sup> day of November 2004.

  
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Paul B. Gamson, Chair

  
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Rita E. Thomas, Board Member

  
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James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.