

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

NEW CASTLE COUNTY, DELAWARE,	:	
	:	
Petitioner,	:	
	:	REPRESENTATION PETITION NO.
AND	:	
	:	<u>23-12-1393 (Clarification)</u>
DELAWARE PUBLIC EMPLOYEES, COUNCIL	:	
81, LOCAL 3109, AFSCME, AFL-CIO,	:	
	:	
Respondent.	:	

RE: CHIEF OF EMERGENCY COMMUNICATIONS

Appearances

Lance Geren, Esq., O’Donoghue & O’Donoghue, for AFSCME LU 3109

Aaron Shapiro, Esq., Connolly Gallagher, for New Castle County

New Castle County, Delaware (“County”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”, 19 *Del. C.* Chapter 13).

The American Federation of State, County, and Municipal Employees, AFL-CIO, Council 81 (“AFSCME”) is an employee organization within the meaning of 19 *Del. C.* §1302(i). AFSCME, through its affiliated Local 3109, is the exclusive bargaining representative of the bargaining unit of the County’s Managers and Administrators as certified by the Governor’s Council on Labor in DOL Case 100, within the meaning of 19 *Del. C.* §1302(j).

The County and AFSCME Local 3109 are parties to a collective bargaining agreement

which was in effect at all times relevant to the processing of this petition.¹

On or about December 21, 2023, the County filed a representation petition seeking to clarify or modify the existing bargaining unit of Managers and Administrators represented by AFSCME LU 3109, to exclude the position of Chief of Emergency Communications (“CEC”).

In order to resolve the issues raised, a hearing was scheduled and conducted on March 28, 2024, at which the parties were provided the opportunity to submit documents and elicit testimony through direct and cross examination of witnesses. The record was closed with the submission of written argument by the parties. This decision results from the record thus created.

ISSUE

WHETHER THE CHIEF OF EMERGENCY COMMUNICATIONS POSITION, EMPLOYED BY NEW CASTLE COUNTY, IS INELIGIBLE FOR REPRESENTATION FOR PURPOSE OF COLLECTIVE BARGAINING OR OTHERWISE INAPPROPRIATE FOR INCLUSION IN THE BARGAINING UNIT CURRENTLY REPRESENTED BY AFSCME LU 3109 AND AS DEFINED IN DOL CASE 100.

FACTS

New Castle County’s Department of Public Safety is comprised of four divisions: New Castle County Police, the Division of Medical Services (Emergency Medical Services or “EMS”), the Office of Emergency Management, and the Division of Emergency Communications. The Director of Public Safety is appointed by the County Executive and is responsible for oversight and management of all four divisions.

Each division is headed by a Chief who reports directly to the Director of Public Safety.

¹ The effective dates of the collective bargaining agreement are April 1, 2019 through June 30, 2023. Article 24.1, Duration of the Contract. At the time of the hearing, the parties were engaged in negotiations for a successor collective bargaining agreement.

Each Chief generally oversees the day-to-day operation of his/her/their division and is responsible for drafting and administering the budget; developing and implementing policies and procedures; addressing personnel issues; and organizational effectiveness.

The Division of Emergency Communications (“DEC”) coordinates the provision of emergency services by and between County police and paramedics, as well as fire departments within the County. There are 85 employees of DEC, who report under a paramilitary structure. The Chief of Emergency Communications has two Assistant Chiefs (one responsible for Operations and one responsible for Administration), several program Coordinators, and telecommunications and radio operators who are organized into four platoons or “squads”.² Each squad is supervised by an Assistant Platoon Leader. The telecommunication employees and the Assistant Platoon Leaders are represented in a bargaining unit by AFSCME Local 3911.

Currently, the Chief of Emergency Communications manages both the DEC and the Office of Emergency Management. The Class Specification for the CEC (revised 2006) states:

General Statement of Duties: Directs and manages the overall activities of the County’s emergency communications activities to ensure quality service in all areas to the citizens of New Castle County; does related work as required.

Distinguishing Features of the Class: An employee in this class performs highly responsible managerial work in establishing, directing, coordinating, and maintaining all emergency services activities for the County, including a highly sophisticated multi-jurisdictional, multi-agency, County-wide computer-aided 9-1-1 emergency communications system. The work is at a managerial level and involves a variety of functions related to planning, directing, administering, and coordinating the overall activities of the County’s emergency services in accordance with accepted practices and emergency services regulations. This employee participates in cooperative planning and coordination with other agencies, including the Delaware Office of Emergency Medical Services, the Volunteer Fire Service, the 9-1-1 Executive Board, and numerous other public safety agencies in a mutual emergency service program. This employee exercises independent judgment and initiative in directing operations and making decisions affecting the delivery of services. This employee works under the general supervision of the Director of Public Safety, and may act on behalf of the Director of Public Safety in his or her absence.

² County Exhibit 4.

Examples of Work: (Illustrative Only)

- Responsible for the maintenance of strict fiscal integrity of the communications activities;
- Implements policies and procedures for the County-wide radio communications for police, fire, and emergency medical services.
- Executes orders and directives of the Director of Public Safety;
- Establishes and implements policies and procedures for the administration and provision of emergency services throughout New Castle County;
- Directs the administration and operations of emergency services agencies directly or through subordinate supervisors;
- Oversees the preparation and administration of the capital and operating budgets;
- Manages the delivery of basic and advanced life support services in accordance with the laws of the State of Delaware, regulations of the State Division of Public Health, and in compliance with the Federal Communications Commission regulations;
- Coordinates the activities of the emergency communications center and with medical facilities in and out of state;
- Maintains liaison with public safety and emergency services agencies;
- Coordinates related activities with all divisions of the Police Department;
- Supervises administrative staff;
- Manages the provision of a quality assurance program;
- Develops goals and plans and ensures that they are achieved;
- Directs all planning, staff studies, and surveys;
- Reviews and approves activity reports and forwards such reports to the Director of Public Safety for concurrence or with recommendations for further action;
- Manages the activities of the emergency services functions with receiving medical facilities, medical control facilities, and outside agencies and representatives including fire and ambulance officials for standardization of response procedures and disaster response planning;
- Responds to inquiries from other agencies and individuals;
- Impartially enforces the rules of conduct governing members of the department and takes necessary disciplinary action as authorized, warranted, and approved by the Director of Public Safety;
- Directs the investigation of all complaints and submits for review all complaints of a serious nature to the Director of Public Safety;
- Performs related duties as assigned;
- Promotes an on-going attitude of dedication to excellent public service and ensures that external and internal customers are provided with the highest quality of service;

- Performs related duties to assist the Director of Public Safety as required to include fulfilling the duties as the acting Director of Public Safety in his or her absence, as designated.
- Operates a data processing terminal, personal computer, and other related equipment in the course of the work. *County Exhibit 3.*

At some point at or around 1995, the Department of Public Safety was reorganized, including renaming and reclassifying positions. The Chief of Emergency Communications began reporting directly to the Director of Public Safety, rather than to the Chief of Police.

The Director of Public Safety, who has served in that position since 2021, testified that the Chiefs of the four divisions are responsible to create and present their annual budget proposals to County Council. He also testified the CEC has been a member of the County team in its negotiations, sitting in negotiations with AFSCME LU 3911, which represents non-supervisory Emergency Services personnel. He relies on the CEC to provide operational expertise on proposals and issues raised during the bargaining sessions. He also solicited bargaining proposals to improve operational efficiency and effectiveness from the CEC.³

Bargaining Unit History:

The Chief of Emergency Communications position was added to the bargaining unit of New Castle County Managers and Administrators represented by AFSCME Local 3109 in 1982.⁴

Article 2, Union Recognition, Membership and Deduction of Dues, of the parties' 2019-2023 collective bargaining agreement states at section 2.1.2:

The term "employees" as used in this Agreement shall include all full-time County employees certified on June 14, 1979, as amended, as part of the Managers and Administrators Bargaining Unit and Professionals Bargaining Unit by the Public Employment Relations Board ("PERB") as listed in Appendix A to this Agreement. The Managers and

³ Transcript ("TR") at p. 71 - 76.

⁴ County Exhibit 1, 2019-2023 Agreement between NCC and Local 3109, Appendix C. It is noted that at some point after 1982, the Governor's Council on Labor renumbered the records of this bargaining unit. The record for this case was renumbered to be DOL Case 100(c).

Administrators Bargaining Unit and the Professionals Bargaining Unit are separate and distinct bargaining units certified by the PERB. The contracts are combined for convenience only.

Appendix A of the 2019-2023 collective bargaining agreement does not include the Chief of Emergency Communications in the List of Bargaining Unit Occupational Classifications found in Appendix “A”.⁵ The position is, however, included in the bargaining unit list included in Appendix “C”.

AFSCME Council 81 Staff Representative Faith Morris testified she is responsible to assist and advised AFSCME Locals, including Local 3109 and Local 3911. On or about October 5, 2023, she advised the Local President to file a grievance on behalf of Local 3109, after learning the County posted the Chief of Emergency Communications vacancy as a non-union position.⁶ By letter memorandum dated October 18, 2023, the County responded it was willing to repost the CEC position as a union position within Local 3109. As a result, AFSCME withdrew the Grievance.⁷ Both AFSCME’s Staff Representative and the County’s Chief Human Resources Officer testified the position was never reposted.⁸

Additional facts will be included and discussed in the discussion below.

POSITIONS OF THE PARTIES

New Castle County:

The County seeks to exclude the Chief of Emergency Communications asserting first that the position is ineligible for representation because it is a confidential position as defined by 19 *Del. C.* §1302(f) and excluded from the definition of a public employee at §1302(o).

⁵ County Exhibit 1 at p. 48.

⁶ County Exhibit 14, posting dated September 5, 2023.

⁷ Union Exhibit 1.

⁸ TR at p. 84 and 91.

Alternatively, the County argues the position should be excluded and the bargaining unit definition modified to delete the CEC position because, by agreement of the parties, this position has not been part of the unit for more than thirty years. Further, it argues that because it is a supervisory position, the CEC's inclusion in the unit would be detrimental to the County and its operations.

AFSCME:

AFSCME asserts the Chief of Emergency Communications is properly included in the bargaining unit of Managers and Administrators represented by AFSCME Local 3109. This position is neither a "supervisory" nor a "confidential" employee under the PERA definitions. There is no evidence that the Chief of Emergency Communications position was ever removed from the bargaining unit. To remove the position now would violate the intent of the General Assembly to grandfather supervisory employees in bargaining units created prior to the implementation of the PERA.

AFSCME also argues that the County has failed to produce any evidence that the continued inclusion of the Chief of Emergency Communications in this bargaining unit creates an untenable conflict of interest or that it has been unable to effectively negotiate with Local 3109 over the past 40 years. The involvement of the Chief of Emergency Communications in bargaining involving a separate and distinct bargaining unit of subordinate employees (AFSCME Local 3911) does not meet the PERA definition of "confidential employee". To expand the definition to exclude the Chief of Emergency Communications would contravene the intent behind the exclusion. It would also, AFSCME argues, lead to a slippery slope, allowing for the employer to seek to exclude employees entitled to representation.

DISCUSSION

Preliminarily, whether the Chief of Emergency Communications performs supervisory functions is immaterial to a determination as to whether he is eligible for representation for purposes of collective bargaining. The CEC was modified into the bargaining unit of Managers and Administrators represented by AFSCME LU 3109 in January 1982, by PERB's predecessor, the Governor's Council on Labor. DOL Case 100(c). When the PERA was passed into law in July 1994, the composition of bargaining units certified by the Governor's Council on Labor were grandfathered to continue as certified without the requirement for review and possible redesignation.⁹ Supervisory positions, as defined by 19 *Del. C.* §1302(s)¹⁰, were explicitly grandfathered into existing bargaining unit definitions in the definition of "public employee" found in 19 *Del. C.* §1302(o):

- (o) "Public employee" or "employee" means any employee of a public employer except: ...
 - (7) Supervisory employees of the public employer, provided however, that any supervisory position in a bargaining unit deemed to be appropriate prior to September 23, 1994, shall so continue, unless said unit is decertified in accordance with § 1311(b) of this title, or is modified in accordance with procedures authorized by §1310(e) of this title.

Consequently, it is unnecessary to consider whether the CEC performs supervisory duties as that determination cannot affect the eligibility of this position for representation.

⁹ 19 *Del. C.* §1310(f): Any bargaining unit designated as appropriate prior to September 23, 1994, for which an exclusive representative has been certified, shall so continue without the requirement of a review and possible redesignation until such time as a question concerning appropriateness is properly raised under this chapter. The appropriateness of the unit may be challenged by the public employer, 30 percent of the members of the unit, an employee organization, or the Board not more than 180 days nor less than 120 days prior to the expiration of any collective bargaining agreement in effect on September 23, 1994...

¹⁰ 19 *Del. C.* §1302(s): "Supervisory employee" means any employee of a public employer who has the authority, in the interest of the public employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such actions, if the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

The purpose of a clarification petition is to determine whether the position in issue is eligible for representation under the PERA and/or whether the position is included or excluded from a currently certified bargaining unit. A Unit Clarification does not amend or modify the existing bargaining unit definition.¹¹ PERB's express authority to determine appropriate bargaining units carries with it the responsibility to police certifications and to clarify them as a means to effectuate the purposes of the law.

The County asserts the CEC meets the statutory definition of a confidential employee:

“Confidential employee” means any employee whose essential job function and advanced knowledge about the issues involved in collective bargaining would make it unduly burdensome for the employer to negotiate effectively if the employee were a member of an appropriate bargaining unit. 19 *Del. C.* §1302(f)

Confidentiality determinations depend upon the specific facts underlying the case and are temporally specific. Examination of the record to determine for whom the employee works, what the employee does, and what knowledge and/or exposure the employee has to issues involved in collective bargaining is required. Ultimately, a determination must be made as to whether, based on the essential functions and advanced knowledge regarding collective bargaining, the representation of the position compromises the employer's negotiating positions and makes it unduly burdensome for the employer to effectively negotiate.¹²

The confidential exclusion protects both the employer and the employees from inherent conflicts of interest which involve the issues involved in collective bargaining.¹³ The Director of Public Safety testified that the CEC is one of four Chiefs who report directly to him. He relies upon the CEC during negotiations for assistance in understanding, evaluating and responding to

¹¹ *COAD & State DOC*, Rep. Pet. 08-01-613, VI PERB 4033, 4040 (2008)

¹² In RE: Capital School District Benefits Specialist, REP 94-09-103, II PERB 1175, 1178 (1995)

¹³ In RE: DOL & AFSCME LU 2038, Administrative Secretary, REP 99-05-258, III PERB 1915, 1921 (2000).

union proposals.

The current CEC (although he had only been in the position approximately seven weeks on the date of hearing¹⁴) testified concerning the involvement of the Assistant Chiefs¹⁵ (a position he previously held) in the AFSCME LU 3911¹⁶ negotiation process:

Just recently 3911 was in the process of doing their recent contract. Prior to me stepping into this position, Chief Miller was the Chief. He was involved and spoke with me and the other Assistant Chief, which is the administrative one, and then changes that we looked at [*sic*]. And we were looking at the ramifications of the change to a 12-hour day. Previous to this, 3911 employees, a day for them was 8 ½ hours even though they worked 12 hours.

So we had to look at the overall effect it would have on the center based on the more time off they would have, and obviously having the constraints of only being able to carry so much time over to the next year.¹⁷

He further testified that he provided a recommendation to the Chief after his analysis, which included:

I had to look at the staffing levels, get a general idea of the amount of time people had on the books, look at the fiscal impact it would have in approving that time off, also under the constraints of only one person allowed to be off at the same time, and make sure we were looking to maintain our proper staffing...

The recommendation was obviously this is going to increase our budget, you know, due to the overtime, but it's a necessary evil based off the fact that they were given to this contractually [*sic*].¹⁸

He also testified that, while the Assistant Chiefs were not at the bargaining table, the CEC

¹⁴ TR at p. 36 – 37. He testified that he had been the Acting CEC between July 2023 and February 6, 2024. He served as the Assistant Chief of Emergency Communications from December 23, 2010 until July 8, 2023.

¹⁵ The Assistant Chiefs are not represented for purposes of collective bargaining by either AFSCME Local 3109 or Local 3911. TR at p. 39.

¹⁶ AFSCME Local 3911 represents the Assistant Platoon Leaders (Police and Fire/EMS), the Telecommunicators I – III, and the Public Safety Operators I – II, who constitute the employees primarily responsible for Emergency Communications. TR at p. 40.

¹⁷ TR at p. 47.

¹⁸ TR at p. 47-48.

was. Following negotiating sessions, the Chief would come back to speak with the Assistant Chiefs,

... [A]nd we would discuss amongst myself and the other Assistant Chief just different things we were looking at. Mutual exchanges were the big thing at the time. They were trying to increase the valid ones – we would allow once a month, then went to two, and now it's at four ... stuff like that.¹⁹

The prior CEC, who served in the position from 2013-2023, was involved in the AFSCME LU 3911 negotiations. He was responsible to evaluate and assess Union proposals and to provide advice and analysis to the Public Safety Director. He sat in negotiating sessions as a member of the County's team and was engaged in developing County responses to Union proposals. He described his involvement:

Preparing the proposals, wage proposals, preparing for any counter that they used before in previous bargaining, the attempt to bring them back into the conversation. One ... that would continually creep up during my time as Assistant Chief and Chief is with the added new positions came with, well, we want more people to be off.

And that just wasn't... going to sustain the operational need of the Communications Division. If we hired more people and then gave more people off, it just wouldn't make operational sense. And we had to come to an agreement to say that ... at the end of the day this seat has to have someone in it 24/7, and that's what we have to come to. And if we were to allow people to have additional days off ... moving from 8 ½ to 12 hours ... that all costs money. Any that takes more time to fill. It creates more angst within the room.

So, absolutely, I was completely involved in those conversations, not only with the Director of Public Safety but with the then ... Chief of Staff.²⁰

His role in the most recent negotiations is consistent with the recollections offered by the current CEC, then serving as the Asst. CEC: As the new CEC, Chief Holden was told by the

¹⁹ TR at p. 48.

²⁰ TR at p. 62-63.

Director of Public Safety that he would be directly involved in negotiations with Local 3911.²¹

This is not a case of first impression concerning the involvement of an alleged confidential employee in collective bargaining for a bargaining unit other than that in which the position is or seeks to be included. *Board of Education of Capital School District and Capital Educational Secretaries Association, DSEA/NEA*, considered this issue:

The Association argues that because the Act requires only that the workload of a confidential employee conflict with “an appropriate bargaining unit” consideration of the evidence in this matter should be limited to assessing the potential conflict of each position between the employee’s responsibilities and membership in the Capital Educational Secretaries Association bargaining unit. While refraining from attempting to fashion a broad and general rule, in the specific factual circumstances presented in this case, the Association’s interpretation is overly narrow. The employees of the Capital School District are members of four separate bargaining units. The exclusive representatives of each of these units are affiliated with the Delaware State Education Association/NEA... In this particular situation, it is unreasonable to consider only the information which relates to the collective bargaining process between the District and its secretaries, while ignoring the close affiliation and organizational linkages between the local associations. Accordingly, the testimony and evidence received in this case has been considered as it relates to the collective bargaining process involving all four units.²²

The Chief of Emergency Communications is directly involved in the negotiations for the bargaining unit of his subordinates, i.e., AFSCME Local 3911. AFSCME’s assertion that confidential exclusion only prohibits employees from being included in the unit if they are involved in the collective bargaining for that specific unit is too narrow to meet the purposes of the PERA. The confidential definition is very specific in excluding employees “... whose essential job function and advanced knowledge about the issues involved in collective bargaining would make it unduly burdensome for the employer to negotiate if the employee were a member of an

²¹ TR at p. 48-49.

²² Board of Education of Capital School District and Capital Educational Secretaries Assn., DSEA/NEA, REP 90-10-056, I PERB 699, 709 (1991).

appropriate bargaining unit.”

Confidential employees are excluded from representation to preserve the negotiating balance between employer and the exclusive bargaining representative. The County has met its burden to establish that the Chief of Emergency Communications does have advanced knowledge of the issues and direct involvement in collective bargaining as a member of the County’s negotiating team in negotiations with AFSCME Local 3911. The CEC’s advanced knowledge and direct involvement in the creation of negotiation strategies and development of policy concerning labor relations create a conflict with its representation by AFSCME. To permit this position to be represented would create a conflict both for the CEC and for the County, an outcome that the PERA does not require.

This decision does not create an unfettered right for employers to seek to exclude employees from bargaining units by widely assigning responsibilities related to collective bargaining.²³ While PERB will consider whether the distribution of confidential responsibilities is logical and reasonable, it is not the intention of the statute to limit an employer’s ability to effectively negotiate by necessitating that it conduct those negotiations through employees with split loyalties.²⁴

Both parties cited to their current and previous collective bargaining agreements²⁵ to support their positions as to whether the Chief of Emergency Communications was included in the bargaining unit and/or whether the parties had agreed to exclude the position from the unit in or around 1998. Appendix “A” in each agreement is entitled “List of Bargaining Unit Occupational

²³ In RE: Indian River Secretarial Association, DSEA/NEA & Indian River School District, REP 04-02-417, V PERB 3115 (2004).

²⁴ Capital Educational Secretaries Assn., at 711.

²⁵ County Exhibit 1 is the current collective bargaining agreement, 2019 -2023; County Exhibit 6 is the 1997-1999 collective bargaining agreement; County Exhibit 9 is the 1999-2002 agreement; and County Exhibit 10 is the 2002-2005 agreement.

Classifications” and Appendix “C” appears to be a list of the positions included in the bargaining unit certification records. AFSCME relies on the fact that the Chief of Emergency Communications position has remained listed in Appendix “C”. The County points to the fact that the position has not been included in the bargaining unit positions listed in Appendix “A” since at least the 1999-2002 agreement. The County further relied upon County Ordinance 98-107²⁶ and subsequent similar Ordinances to support its claim that the parties agreed to remove the CEC from the bargaining unit and to convert it to a non-union position.

A thorough review of the Appendices to the collective bargaining agreements reveals that most of the changes included therein were never made to the certification records maintained by PERB, as required by the PERA, for this bargaining unit. In fact, of the fifteen (15) “Miscellaneous” classifications listed in Appendix “C” of the 2019-2023 collective bargaining agreement, only two are included in the official bargaining unit records. Certainly, AFSCME, as a party to each of the negotiated agreements, had to be aware of the change in status for the CEC position, as well as to the changes in the list of bargaining unit positions. The inconsistencies between Appendices “A” and Appendices “C” had to have been agreed to by these parties, as all of the agreements were executed and implemented.

A Unit Clarification petition cannot seek enforcement, application, or interpretation of the recognition clause of the parties’ collective bargaining agreement, to the extent that the negotiated recognition clause does not comport with the bargaining unit certification records maintained by PERB.²⁷ This case again evidences the infirmity of negotiating unit composition changes and failing to record changes with PERB. Negotiated changes to unit composition are effective for the

²⁶ County Exhibit 7.

²⁷ Appoquinimink Education Association, DSEA & Appoquinimink School District, Rep. Pet. 13-05-906, VIII PERB 5869, 5879 (2013).

life of the collective bargaining agreement and enforcement can only be made through the grievance procedure included in that agreement. Whether an agreement to exclude the Chief of Emergency Communications ever existed, it is irrelevant to the resolution of this clarification petition.

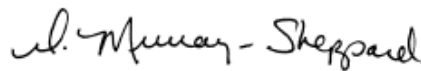
DECISIONS

Based on the record, review and consideration of the arguments presented by the parties, and application of the PERA, the Chief of Emergency Communications is determined to be a confidential position within the meaning of 19 *Del. C.* 1302(f) and is therefore excluded from eligibility for inclusion in any bargaining unit for purposes of collective bargaining by operation of 19 *Del. C.* §1302(o).

WHEREFORE, the petition is granted, and the bargaining unit is clarified to exclude the position of Chief of Emergency Communications.

IT IS SO ORDERED.

DATE: August 8, 2024



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.